Supreme Court, U.S.
FILED

n/d

No. 10-430

SEP 27 2010

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In The

Supreme Court of the United States

SHANNA WERNER, an individual,
and JAMES BRYANT, an individual,

Petitioners,

v.

PEAK ALARM COMPANY, INC., a Utah Corporation,
JERRY D. HOWE, an individual, and
MICHAEL JEFFREY HOWE, an individual,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Utah

PETITION FOR WRIT OF CERTIORARI

J. WESLEY ROBINSON*
Senior Salt Lake City Attorney
**Counsel of Record*
P.O. Box 145478
Salt Lake City, UT 84114-5478
Telephone: (801) 535-7788
J.Robinson@slcgov.com

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

On a daily basis, peace officers across the nation are confronted with suspects who claim innocence, or assert their subjective belief that they have committed no crime. Lacking mind-reading capabilities, a suspect's mind is incapable of divination by another. Peace officers need not rule out all innocent explanations for a suspicious set of facts to have probable cause to seize an individual. *Illinois v. Gates*, 462 U.S. 213 (1983). Rather, officers need only a "reasonable ground for belief of guilt," *Maryland v. Pringle*, 540 U.S. 366, 370 (2003), a "probability, and not a prima facie showing, of criminal activity," *Gates*, 462 U.S. at 235. An officer may draw "inferences based on his own experience in deciding whether probable cause exists," *Ornelas v. United States*, 517 U.S. 690, 700 (1996), including inferences "that might well elude an untrained person," *United States v. Cortez*, 449 U.S. 411 (1981). Qualified immunity gives "ample room for mistaken judgments" as to the existence of probable cause, protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986). The questions presented are:

1.

Does a police officer lack probable cause to momentarily seize a person in order to issue him a citation merely because the cited person subjectively believed that he did not commit any crime?

QUESTIONS PRESENTED – Continued

2.

Assuming that Petitioners were mistaken in their belief that probable cause existed, were they nevertheless improperly denied qualified immunity solely because they did not believe the cited person's claims of innocence, his alleged subjective beliefs, or his self-serving construction of the known facts?

3.

Did the Utah Supreme Court err when it speculated as to the cited person's subjective belief, failed to examine all of the facts and circumstances known to Petitioners, failed to analyze whether Petitioners could have reasonably believed that probable cause existed under the circumstances, and speculatively constructed what it determined could be a more reasonable construction of the events seven years after the fact?

PARTIES TO THE PROCEEDING

1. **Petitioners** (defendants/appellees below): **SHANNA WERNER** and **JAMES BRYANT** in their individual capacities.

2. **Respondents** (plaintiffs/appellants below): **PEAK ALARM COMPANY, INC.**, a Utah corporation; **JERRY D. HOWE**, an individual; and **JEFFREY HOWE**, an individual.

3. **Additional defendants/appellees below** (not parties to this Petition): **SALT LAKE CITY CORPORATION**, a Utah municipal corporation; **CHARLES "RICK" DINSE**, an individual; **SCOTT ATKINSON**, an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Shanna Werner and James Bryant (referred to collectively as "Petitioners") respectfully petition the Court for a writ of certiorari to review the judgment of the Supreme Court of Utah.

OPINIONS BELOW

The Utah Supreme Court's opinion dated April 16, 2010 is reported at 2010 UT 22, and is reproduced at App. 1-59.

The Utah Supreme Court's denial of Petitioner's Petition for Rehearing dated June 28, 2010 is not reported, and is reproduced at App. 60-100.

The ruling of the Third District Court, Salt Lake County, State of Utah, granting summary judgment in favor of Petitioners, filed October 6, 2008, is not reported. It is reproduced at App. 101-102.

JURISDICTION

1. The decision sought to be reviewed was entered on April 16, 2010 by the Utah Supreme Court.

2. Petitioners timely filed a Petition for Rehearing, which was denied by the Utah Supreme Court on June 28, 2010.

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's

> judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

Utah Code Annotated § 76-9-105 (2002), "Making a False Alarm," provides:

> (1) A person is guilty of making a false alarm if he initiates or circulates a report or warning of any fire, impending bombing, or other crime or catastrophe, knowing that the report or warning is false or baseless and is likely to cause evacuation of any building, place of assembly, or facility of public transport, to cause public inconvenience or alarm or action of any sort by any official or volunteer agency organized to deal with emergencies.
>
> (2)(a) Making a false alarm relating to a weapon of mass destruction as defined in Section 76-10-401 is a second degree felony.
>
> (b) Making a false alarm other than under Subsection (2)(a) is a class B misdemeanor.
>
> (3) In addition to any other penalty authorized by law, a court shall order any person convicted of a felony violation of this section to reimburse any federal, state, or local unit of government, or any private business, organization, individual, or entity for all

> expenses and losses incurred in responding to the violation, unless the court states on the record the reasons why the reimbursement would be inappropriate.

STATEMENT OF THE CASE

This case begins with a citation issued to Respondent Michael Jeffrey Howe ("Howe"), Peak Alarm Company's Central Station Manager, for allegedly making a false alarm on June 27, 2003, in violation of Utah Code Ann. § 76-9-105 (2002). Mr. Howe reported to police dispatch that there were burglar alarms going off at West High School in Salt Lake City, Utah. App. 6. When dispatch informed him that the police department does not respond to alarms, he changed his story, falsely reporting it was "an actual burglary in progress," that it was verified by a security guard on scene, that his guard was "asking for police assistance," and that the male guard was in uniform and would meet the responding officers in front of the school. App. 6-7, 18-19. In reality, it was a female school cafeteria employee who reported that two girls came into the school and set off the alarms. App. 5. There was no male security guard in uniform to meet responding officers at the front of the school. App. 7-8, 69.

In response to Howe's call, seven Salt Lake City Police officers responded to the school. App. 69. The first officer to arrive at the scene, Officer Shaun Wihongi, was the lead investigator. Officer Wihongi

found no evidence of any crime at the school. He interviewed the cafeteria worker and spoke with Howe twice regarding the false information he provided to police dispatch. App. 7-8, 69. Howe told Officer Wihongi that he made assumptions that turned out to be false, and that he was not happy that the police refused to respond to the burglar alarm. *Id.* When asked why he made those statements to police, Howe told Officer Wihongi, "[W]hatever it takes, I thought this was a panic alarm." *Id.* Officer Wihongi interpreted this statement to mean that Howe was willing to say whatever it took to get a police response, and that Howe manipulated the Police Department with false information. App. 71.

Based on his investigation of the call, Officer Wihongi concluded that Howe intentionally misled the Police Department by providing false information in order to initiate a police response he could not otherwise obtain. *Id.* Officer Wihongi prepared a police report and communicated his conclusions to his supervisor, Sergeant James Bryant. *Id.* Sgt. Bryant consulted with a city prosecutor to informally screen the facts of this incident and determine whether any statute had been violated.

Relying on Officer Wihongi's conclusions and the prosecutor's legal advice, Sgt. Bryant concluded that probable cause existed to believe that Howe violated

the false alarm statute.[1] He and another officer issued a citation to Howe on July 21, 2003. App. 9. Howe was tried in the Salt Lake City Justice Court on April 12, 2004, and won a directed verdict in his favor because the prosecution failed to present any evidence that Howe "knowingly or intentionally made . . . a false alarm." App. 9-10.

Howe brought suit against Petitioners alleging, among other claims not relevant to these proceedings, that Petitioners violated his Fourth Amendment rights because they lacked probable cause to cite him and have him prosecuted for making a false alarm. Both parties moved for summary judgment. Petitioners asserted that probable cause existed to believe that Howe may have violated the false alarm statute, and that they were entitled to qualified immunity. Howe argued that Petitioners had no evidence to prove that he knew his report to dispatch was false or baseless, and therefore they lacked probable cause. The District Court rejected Howe's argument, finding that Respondents failed to demonstrate a lack of

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[1] Shanna Werner, Salt Lake City's Alarm Coordinator, is not a peace officer and has no law enforcement authority of any kind. She is neither a lawyer nor a prosecutor. It is undisputed that she did not make any probable cause determination regarding Jeffrey Howe. By his own admission, Sgt. Bryant alone made that determination. However, Werner is a Petitioner because summary judgment in her favor was reversed by the Utah Supreme Court. Therefore, to the extent Werner remains a defendant in this action, she is entitled to the same relief as that sought herein by Sgt. Bryant. For the sake of simplicity, only Sgt. Bryant's name is used in the argument herein.

probable cause, and Petitioners were entitled to qualified immunity. App. 70-71, 76, 86. The District Court further found that there were no issues of material fact in dispute regarding the existence of probable cause. App. 85-86.

Respondents appealed, and the Utah Supreme Court affirmed in part. and reversed in part. In affirming the District Court's rejection of Respondents' partial summary judgment motion, the Court properly recognized that Utah's treatment of probable cause mirrors federal Fourth Amendment jurisprudence, and correctly set forth the probable cause standard applied by federal courts. App. 17-18, 33-34. The only fact in Howe's favor cited by the Court was his subjective belief, at the time he made his report to dispatch, that a burglary in fact occurred at West High School, and that a male, uniformed guard was on-scene to verify the alleged crime. App. 18-19. On Petitioners' side, the Court found the following:

> Mr. Howe told police dispatch that a security guard had verified the burglary. He knew that police would not otherwise respond. From his lobbying activities, Mr. Howe knew the content of the Salt Lake City ordinance. And Mr. Howe's own employee had been told by a police dispatcher, minutes earlier, that police would not respond to unverified burglar alarms by an alarm company. Additionally, Mr. Howe's own "whatever-it-takes" statement could be interpreted by a prudent officer as meaning that Mr. Howe would say anything necessary to persuade police to

> respond to a mere burglary alarm regardless of whether he believed an actual burglary had occurred. Finally, there are inconsistencies in Mr. Howe's initial statement. Mr. Howe told police dispatch that there was a burglary in progress. By the time Mr. Howe was interviewed by police, he claimed he was reporting a "panic alarm" based on a theory that "someone's life could potentially be in danger."

App. 19-20.

The Court concluded that the District Court did not err in rejecting Howe's motion for partial summary judgment: "Given these facts, we cannot conclude as a matter of law that a prudent officer would not have been justified in concluding Mr. Howe reported a crime while knowing it was false." App. 20.

However, in reversing the District Court's grant of summary judgment in Petitioners' favor, the Court discounted all of these factors and relied solely on Howe's claims of subjective belief and incorrect assumption. App. 34-37. In taking the burden imposed by Utah and Federal Rule 56 to an extreme, the Court failed to properly analyze the probable cause standard as applied to the totality of the facts and circumstances presented in this case. The Court held that Sgt. Bryant lacked probable cause to "seize" Howe because, taking the facts presented by Howe as true, the Court speculated that the facts "tend to show that [Howe] believed a burglary was occurring at West High School." App. 36. Because Sgt. Bryant

and Ms. Werner "simply disregarded [Howe's] construction of the facts known to them," the Court concluded that the facts alleged by Howe "raise at least a jury question on the lack of probable cause and, therefore, make out a constitutional violation of Mr. Howe's right to be free from unreasonable seizure sufficient to survive qualified immunity." App. 36-37.

The Court's decision contained no analysis of whether a reasonable officer, operating under the facts known to Sgt. Bryant, including any reasonable inferences drawn therefrom, could have justified his belief that Howe committed a crime, and that probable cause existed to detain and cite him. In light of the total absence of any case law interpreting the false alarm statute, Bryant's interpretation and conclusions needed only be reasonable. Further, while the Court felt compelled to accept Howe's construction of the circumstances as reasonable in opposition to summary judgment, it was not the *only* reasonable explanation that could have been reached. It was, however, the only construction given any weight by the Court.

Regarding the second prong of the qualified immunity analysis, the Court found that the federal jurisprudence was clearly established that a government official must have probable cause to arrest an individual. App. 37-38. Because Sgt. Bryant detained Howe without probable cause, the seizure was a violation of a clearly established constitutional right. *Id.*

The Utah Supreme Court denied Petitioners' Petition for Rehearing on June 28, 2010. App. 101-102.

REASONS THE PETITION SHOULD BE GRANTED

In holding that (1) a police officer lacks probable cause to momentarily seize a person in order to issue him a citation merely because the cited person subjectively believed that he did not commit any crime, and (2) denying qualified immunity to an officer who "disregarded" a suspect's construction of the facts and circumstances known to the officer, without regard to the officer's reasonableness under totality of the circumstances, the Utah Supreme Court has decided an important federal question in a way that significantly conflicts with this Court's well-established precedent regarding probable cause and qualified immunity.

To make matters worse, it places law enforcement in an impossible predicament. Lacking mind-reading capabilities, law enforcement officers are powerless to prove, or disprove, a suspect's subjective knowledge, intent or state of mind. That determination must be left to a jury. This is particularly true where, as here, officers are deprived of the surrounding facts and circumstances known to them, and the reasonable inferences drawn from their interactions, observations, interpretations and contextual

relationships in order to demonstrate the reasonableness of their determination whether or not probable cause exists. The standard announced by the Utah Supreme Court ignores the factual and practical considerations of everyday life and the fundamental nature of law enforcement operations. The "Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972). "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

The very essence of this Court's probable cause and qualified immunity precedent is the recognition that law enforcement officers may err, and it is better to risk some error and possible injury, as long as the error is reasonable under the totality of the circumstances, than not to decide or act at all. *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974).

Clarification of the boundaries of legitimate law enforcement action under the Constitution is ultimately the responsibility of this Court. Certiorari should be granted.

I. THE UTAH SUPREME COURT'S PROBABLE CAUSE ANALYSIS CONFLICTS WITH THIS COURT'S FOURTH AMENDMENT PRECEDENT, FAILS TO ADDRESS THE REASONABLENESS OF SGT. BRYANT'S BELIEF THAT PROBABLE CAUSE EXISTED, AND SETS AN IMPOSSIBLE STANDARD FOR ANY LAW ENFORCEMENT OFFICER TO MEET.

To succeed in his claims, Howe had the burden to prove that Sgt. Bryant lacked probable cause to cite him. *Hartman v. Moore*, 547 U.S. 250, 258, 265-66 (2006) ("In an action for malicious prosecution after an acquittal, a plaintiff must show that the criminal action was begun without probable cause for charging the crime in the first place."); *Wilder v. Turner*, 490 F.3d 810, 813-14 (10th Cir. 2007) (plaintiff must prove lack of probable cause in § 1983 action for unlawful arrest).

As the Utah Supreme Court properly recognized, the probable cause standard requires the Court to determine whether the facts known to Sgt. Bryant, along with any fair inferences that may be derived from them, would lead a reasonable and prudent person in the officer's position to be justified in believing that Howe committed a criminal offense. App. 17-20, 33-37. The probable cause standard is a "practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal

technicians, act." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (internal quotation marks omitted).

The probable cause standard is incapable of precise definition or reduction to a neat set of rules because it deals with the assessment of probabilities in particular factual contexts, and depends on the totality of the circumstances. *Gates*, 462 U.S. at 230, 232. All that is required is simply "a reasonable ground for belief of guilt," *Pringle*, 540 U.S. at 371, a "probability, and not a prima facie showing, of criminal activity," *Gates*, 462 U.S. at 235 (*quoting Spinelli v. United States*, 393 U.S. 410, 419 (1969)); *see also Massachusetts v. Upton*, 466 U.S. 727, 734 (1984) (recognizing that "probable cause does not demand the certainty we associate with formal trials"); *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) ("the validity of the arrest does not depend on whether the suspect actually committed a crime."). "[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists," *Ornelas v. United States*, 517 U.S. 690, 700 (1996), including inferences "that might well elude an untrained person," *United States v. Cortez*, 449 U.S. 411, 418 (1981). Measuring the degree of suspicion that attaches to a set of facts requires this Court to view the evidence through the lens of those "versed in the field of law enforcement," not applying the "library analysis" employed by constitutional "scholars." *Texas v. Brown*, 460 U.S. 730, 742 (1983).

A police officer is not required to eliminate all innocent explanations for a suspicious set of facts to

have probable cause to make an arrest. As this Court explained in *Gates*, "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty', but the degree of suspicion that attaches to particular types of noncriminal acts." *Gates*, 462 U.S. at 243, n. 13. To require otherwise, as the Utah Supreme Court has done here, "would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens' demands." *Id.*

Here, the Utah Supreme Court's decision ignores the import of the foregoing precedent of this Court. First, it wholly failed to address the reasonableness of Sgt. Bryant's probable cause determination. Instead, the Court focused its analysis solely on the "much closer question" of whether *Howe* had *subjective knowledge* of the falsity of his report. App. 35-36. The correct issue here is not whether Howe actually violated the law, but whether Sgt. Bryant had a reasonable belief that there existed a probability of criminal activity.

Factors recognized by the Court in favor of probable cause were:

- Howe falsely told dispatch that a security guard had verified a burglary in progress.

- One of Howe's own employees had been told by police dispatch just minutes earlier that police would not respond to an unverified alarm.

– In reporting a "burglary in progress," Howe knew that police would not otherwise respond.

– Howe's "whatever it takes" comment could be interpreted by a prudent officer as meaning that he would say anything necessary to obtain a police response, regardless of whether he believed an actual burglary had occurred.

– Howe gave inconsistent statements to dispatch and the investigating officer, first reporting a burglary alarm, then a burglary in progress, and later claiming it was a panic alarm.

– Howe stated to the investigating officer that it would be fine if he was fined.

App. 7-8, 19-20.

These undisputed facts establish that Sgt. Bryant had probable cause to believe Howe committed the crime of making a false alarm. Indeed, in affirming the District Court's denial of Respondents' Motion for Partial Summary Judgment, the Utah Supreme Court held: "we cannot conclude as a matter of law that a prudent officer would not have been justified in concluding Mr. Howe reported a crime while knowing it was false." App. 20.

Curiously, in reversing the District Court's grant of summary judgment in favor of Petitioners, the Court felt compelled to ignore all of the foregoing facts, abandoned the foregoing conclusion, and

focused solely on Howe's construction of the circumstances. Taking all of the facts alleged by Mr. Howe as true, the Court speculated that the facts "tend to show [Howe] believed a burglary was occurring at West High School," and faulted Petitioners for disregarding Howe's construction of the facts. App. 36-37. While the Court was free to adopt Howe's construction of the facts as the most reasonable under the circumstances (in its opinion), it was *not* free to adopt it as the *only* acceptable construction. This Court's precedent merely requires *a* reasonable conclusion. The Court should have focused its attention on whether Sgt. Bryant's conclusions were reasonable under the circumstances, not whether another reasonable, or more reasonable, interpretation of the events could be constructed seven years after the fact.

For officers faced with charging decisions involving crimes requiring a subjective knowledge element, the probable cause standard announced by the Utah Supreme Court in this case is impossible for any law enforcement officer to meet. "Unless the court is somehow able to open the mind of the defendant to examine his motivations, intent is of necessity proven by circumstantial evidence." *State v. James*, 819 P.2d 781, 789 (Utah 1991). No court or law enforcement officer has the capability of conclusively determining a suspect's subjective knowledge or intent. In these cases, an officer need only a reasonable basis to believe that a crime has occurred in order to make a charging decision, while a suspect's *actual* subjective knowledge or intent is for a jury to decide.

In Utah, to show probable cause for intent, "the State must only prove that its theory of intent is reasonable." *State v. Ingram*, 2006 UT App 237, 139 P.3d 286 (additional citations omitted). "Knowledge or intent is a state of mind generally to be inferred from the person's conduct viewed in light of all the accompanying circumstances." *Id.* (*citing State v. Kihlstrom*, 1999 UT App 289, ¶ 10, 988 P.2d 949); *see also State v. Wallace*, 2006 UT App 232, ¶ 23, 138 P.3d 599 ("The Utah Supreme Court 'ha[s] held that intent to commit a crime may be inferred from the actions of the defendant or from surrounding circumstances.'" (alteration in original) (*quoting State v. Colwell*, 2000 UT 8, ¶ 43, 994 P.2d 177)). "So long as there is some evidence including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." *Id.* (*citing State v. Hall*, 946 P.2d 712, 724 (Utah Ct. App. 1997)). Significantly, the evidentiary standard necessary to "support a reasonable belief that an offense has been committed and that the defendant committed it" is "relatively low." *State v. Clark*, 2001 UT 9, ¶¶ 10, 16, 20 P.3d 300.

Howe's protests of innocence do not affect the probable cause determination, particularly where it hinges on his *subjective* knowledge or intent. "Once Defendants concluded that the initially discovered facts established probable cause, they were under no obligation to forego arresting Plaintiff or release him merely because he said he was innocent." *Romero v. Fay*, 45 F.3d 1472, 1481 (10th Cir. 1995).

Here, the question before the Court is *not* whether Howe was guilty of a crime beyond a reasonable doubt, but whether the facts and circumstances within Sgt. Bryant's knowledge were sufficient to warrant a prudent officer in believing that a criminal offense may have been committed. This Court should not turn a blind eye on a state supreme court decision that seriously undermines this Court's Fourth Amendment jurisprudence on an issue of such great importance.

II. THE COURT'S QUALIFIED IMMUNITY ANALYSIS CONFLICTS WITH FEDERAL PRECEDENT.

"Law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Again, whether Howe actually committed a crime is not dispositive. This Court has recognized that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable." *Id.* Qualified immunity leaves "ample room for mistaken judgments," protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986).

This accommodation for reasonable error exists because the probable cause standard is so ill-defined, and "officials should not err always on the side of caution" simply because they fear getting sued. *Davis v. Scherer*, 468 U.S. 183, 196 (1984). "Therefore, when a warrantless arrest or seizure is the subject of a § 1983 action, the defendant is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest or detain the plaintiff." *Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007).

Here, even if Sgt. Bryant was mistaken in his belief that probable cause existed, his decision was reasonable. The Utah Supreme Court acknowledged that whether Howe knew his report to police dispatch was false or baseless is a "close[ ] question." App. 35. Parsing the false alarm statute's plain language (a matter of first impression in Utah), the Court determined that the "linchpin to criminal culpability under Utah Code section 76-9-105 is the caller's subjective knowledge that the report is false or baseless as to the existence of a crime." App. 36. Based on the circumstances presented to Sgt. Bryant, his admitted inability to read minds, the lack of any reported Utah case interpreting the false alarm statute, and the "close question" of Howe's subjective knowledge, Howe cannot demonstrate as a matter of law that Sgt. Bryant was plainly incompetent or knowingly violated the law.

The error in the Utah Supreme Court's analysis is further apparent from its statement that "[w]e

believe the facts alleged by Mr. Howe raise at least a jury question on the lack of probable cause and, therefore, make out a constitutional violation of Mr. Howe's right to be free from unreasonable seizure sufficient to survive qualified immunity." App. 37. This legal conclusion is wrong for three reasons. First, it places the question of qualified immunity in the hands of the jury, contrary to this Court's clear instruction that immunity should be decided by the court long before trial. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Second, Petitioners cannot, and do not, dispute Howe's claim regarding his subjective knowledge. This is not a jury issue. Sgt. Bryant's probable cause conclusion was made based on other circumstances wholly unrelated to Howe's claimed subjective knowledge, circumstances that were not considered by the Utah Supreme Court in its analysis. Finally, as already stated, the Court should have focused its attention on whether Sgt. Bryant's conclusions were reasonable under the circumstances, not whether another reasonable, or even more hypothetically reasonable, interpretation of the events could be constructed seven years after the fact.

Finally, the Utah Supreme Court's ruling on the second prong of the qualified immunity analysis conflates the separate and distinct inquiries for probable cause and qualified immunity into one general proposition: since it is clearly established that officers must have probable cause to arrest, and any reasonable and prudent officer must know this, then Sgt. Bryant violated Howe's clearly established rights

when he detained Howe without probable cause. This Court's precedents require that this question be "undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Because officers routinely perform their duties with considerable uncertainty as to whether their decisions and actions comport with the Fourth Amendment,

> [t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, [here probable cause], will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a [probable cause determination] is legal in those circumstances. If the officer's mistake is reasonable, however, the officer is entitled to the immunity defense.

Saucier, 533 U.S. at 205 (addressing excessive force, probable cause substituted in brackets). The *Saucier* Court went on to observe:

> Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth

> Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions.

Id. at 206. The Utah Supreme Court's analysis below was clearly insufficient and contrary to this Court's Fourth Amendment jurisprudence.

Here, the facts and circumstances known to Sgt. Bryant, without regard to Howe's subjective knowledge or belief, disclosed substantial grounds for him to conclude that probable cause existed to cite Howe with a criminal violation. Assuming he was incorrect, this Court must allow Sgt. Bryant ample room to reach even a mistaken, albeit reasonable, judgment in determining whether probable cause existed to support the citation or any claimed "seizure" of Howe. Well-established, long-standing federal precedent requires that this Court grant qualified immunity to any prudent officer who acts reasonably in making probable cause determinations, unless the Court finds as a matter of law that the officer was plainly incompetent or knowingly violated the law. Being neither, Sgt. Bryant is entitled to qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the Utah Supreme Court's decision manifestly contravenes this Court's Fourth Amendment precedent, the Court should consider summary reversal.

Respectfully submitted,

J. WESLEY ROBINSON*
Senior Salt Lake City Attorney
*Counsel of Record
P.O. Box 145478
Salt Lake City, UT 84114-5478
Telephone: (801) 535-7788
J.Robinson@slcgov.com

Attorney for Petitioners

September 27, 2010

2010 UT 22

This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT
OF THE STATE OF UTAH
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Peak Alarm Company, Inc., a Utah corporation; Jerry D. Howe, an individual; and Michael Jeffrey Howe, an individual,

Plaintiffs and Appellants,

v.

Salt Lake City Corporation, a Utah municipal corporation; Shanna Werner, an individual; Charles F. "Rick" Dinse, an individual; Scott Atkinson, an individual; James Bryant, an individual; and John Does I-X, individuals,

Defendants and Appellees.

No. 20080918

FILED

April 16, 2010

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Third District, Salt Lake
The Honorable L. A. Dever
No. 050906433

Attorneys: Kenneth A. Okazaki, Stephen C. Clark, Arthur Fine, Kathleen E. McDonald, Salt Lake City, for plaintiffs
J. Wesley Robinson, Salt Lake City, for defendants

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DURHAM, Chief Justice:

INTRODUCTION

¶1 This case began with a telephone call for police assistance by a private alarm company. In time, this single call led to a misdemeanor prosecution and then this civil lawsuit. The call was made after a number of teenage girls set off burglar alarms at a Salt Lake City high school. Salt Lake City police concluded the caller, Michael Jeffrey Howe, violated a state statute criminalizing the making of a false alarm and charged him accordingly. Mr. Howe stated in the call that a Peak Alarm security guard had verified the break in. In reality it was a school employee who had confirmed the alarm and requested the alarm company summon police. The single-count criminal prosecution concluded with a directed verdict in Mr. Howe's favor in the Salt Lake City Justice Court. Following the acquittal, Mr. Howe sued Salt Lake City along with several police department employees and administrators.

¶2 This appeal concerns that civil litigation. Mr. Howe alleges the district court committed reversible error in ruling on three motions. First, Mr. Howe challenges the district court's rejection of his motion for partial summary judgment. Mr. Howe attempted to use the directed verdict in his criminal prosecution as a predicate for summary judgment on the issue of probable cause, which was part of several of his claims. The district court concluded that the directed

verdict and surrounding circumstances failed to prove police acted without probable cause in charging Mr. Howe. Second, Mr. Howe asserts the district court erred in dismissing his state claims when it granted Salt Lake City's motion for summary judgment based on procedural requirements imposed by the Utah Governmental Immunity Act (UGIA). Finally, Mr. Howe argues the district court erred in granting Salt Lake City's motion for summary judgment on his claims of civil rights violations arising under federal law. In all, the district court dismissed seven independent claims arising in federal law on the basis of qualified immunity, pleading errors by Mr. Howe and deficiencies in connecting Salt Lake City and several supervisors to any constitutional deprivation by individual officers and employees.

¶3 We affirm the district court's holding that the directed verdict in Mr. Howe's criminal trial is not conclusive evidence that the city acted without probable cause. Also, the district court correctly rejected Mr. Howe's alternative argument by holding that all the facts before the court did not prove Salt Lake City acted without probable cause. However, we reverse the district court's grant of summary judgment in favor of Salt Lake City on Mr. Howe's state law claims. Summary judgment arising under the UGIA was in error because Mr. Howe provided a sufficient and timely notice of claims. As to Mr. Howe's federal claims alleging civil rights violations, the district court erred in dismissing Mr. Howe's Fourth Amendment seizure claim because Mr. Howe presented facts

that supported a claim that an unlawful seizure did occur and that officers lacked probable cause to support the seizure. We affirm the district court's dismissal of Mr. Howe's remaining six civil rights claims.

BACKGROUND

I. SALT LAKE CITY'S VERIFIED RESPONSE ORDINANCE

¶4 While this civil case is based on the events surrounding Mr. Howe's call to police on June 27, 2003, Mr. Howe alleges his prosecution was rooted in a long-standing acrimonious relationship between Peak Alarm and the Salt Lake City Police Department. The hostility, Mr. Howe alleges, began years earlier as the police department grew concerned over resources expended in responding to false alarms reported by private alarm companies. In response to police complaints that calls from private security firms were a waste of police resources, Salt Lake City officials enacted the verified response ordinance in December 2000. The ordinance precludes a police response to an "intrusion" alarm reported by a private security company without on-site verification from an alarm company employee. Salt Lake City Ordinance 5.08.095.

¶5 In addition to instituting the verified response policy within Salt Lake City, Shanna Werner, the department's alarm administrator, was occasionally quoted in trade publications as well as local and

national media reports about the city's efforts to manage alarm company calls. Ms. Werner also spoke to city officials in other Utah communities about the program. As part of her public comments on the issue, Ms. Werner criticized the alarm industry as earning profits without providing any services, wasting public resources, and for preying on the fears of potential customers. Mr. Howe became part of this public debate as well. Most notably, in 2003 he became chair of a committee formed by the Utah Alarm Association to lobby against the adoption of the verified response policy by other cities in Utah.

II. BURGLAR ALARMS AND MR. HOWE'S CALL TO POLICE DISPATCH

¶6 In the early morning hours of June 27, 2003, the lunchroom staff arrived at West High School and began preparing meals for a summer lunch program. A supervisor turned off the security alarm in the lunchroom, cafeteria, and an adjacent hallway. She left the motion-activated alarms on in the rest of the school. Shortly before 9 a.m. the still-activated alarms went off. Two staff members reported two girls had entered the school and gone up to the second level. The supervisor called Peak Alarm. She asked Peak Alarm to send police because she "wanted to make sure [the girls] weren't up to some mischief" and no one on the lunchroom staff was "trained to deal with intruders." In an affidavit submitted in this case, the supervisor stated police never questioned her about the girls and what transpired in the school, but

focused only on the information she gave to Peak Alarm.

¶7 Following a telephone conversation with the supervisor, a Peak Alarm employee called the Salt Lake City Police dispatch and requested police respond to a "burglar alarm." The police dispatcher refused to send officers to the school and added police would only be sent after school employees "called us from the school and asked us to help remove them." The Peak Alarm employee's subsequent attempts to contact the supervisor and other school officials were unsuccessful. The Peak Alarm employee apprised Mr. Howe, who was the alarm company's central station manager, of the situation. Mr. Howe then called police dispatch himself. The following conversation ensued:

> **Mr. Howe:** Hey, we have an actual burglar alarm going off at West High, and I guess my dispatcher just called up and said you guys weren't going to go on an actual burglar alarm?
>
> **Police dispatch:** No, we don't go on burglar – we haven't gone on burglar alarms for two years.
>
> **Mr. Howe:** This is an actual burglary in progress, it's been verified.
>
> **Police dispatch:** No, [the Peak Alarm employee] didn't say that, she said it was an alarm.

Mr. Howe: . . . We actually have people inside and my guard is asking for police assistance.

Police dispatch: Okay, that's what I needed.

. . .

Police dispatch: Okay, and how many, how many?

Mr. Howe: They said two or three kids.

Police dispatch: Where at?

Mr. Howe: Didn't get that information just the alarm's coming from the second floor, but they're running throughout the whole building.

. . .

Police dispatch: And where do we meet your guard at?

Mr. Howe: Just in front of the school.

Police dispatch: Is he in uniform or she?

Mr. Howe: Yes, he is.

¶8 Over the course of the day, there were a number of additional conversations between Mr. Howe and dispatchers and a police officer to clarify what information had been conveyed to Peak Alarm, whether this was a panic alarm or a burglary alarm, and the status of the security guard. In these subsequent conversations, Mr. Howe readily acknowledged

that he had assumed that a security guard from Peak Alarm had confirmed the unauthorized entry and that it was the guard who had requested police assistance. The most significant of these later conversations came in two interviews conducted by Salt Lake City Police Officer Shaun Wihongi. In the first interview, Officer Wihongi reported Mr. Howe claimed he was led "to believe" the school employees "were in imminent danger" and he was unhappy that police refused to go to the scene after the initial call for police assistance. When asked why he made the specific statements about the security guard, Mr. Howe told Officer Wihongi, "[W]hatever it takes, I thought this was a panic alarm." In the second interview – which Officer Wihongi recorded – Mr. Howe reiterated that he believed school employees were in danger because "they had unauthorized people within the building that should not have been in there. . . . [S]omeone's life could potentially be in danger." Mr. Howe also stated, "If we're even charged for a false alarm, I don't care. I was just – hey, charge us if you have to, we'll be glad to pay it."

III. MR. HOWE'S CRIMINAL CITATION AND PROSECUTION

¶9 Over the next few weeks, Mr. Howe attempted to contact Ms. Werner to discuss the police response to the high school. Ms. Werner did not return Mr. Howe's calls and felt "listening to more rhetoric was unnecessary." It wasn't until July 14, 2003, when Sgt. James Bryant met with Ms. Werner,

that police began considering criminal charges against Mr. Howe. In considering charges, Sgt. Bryant focused on the information Mr. Howe provided to police dispatch. "The false information provided was that an employee or agent of Peak Alarm was on the scene, and that the employee or agent either had contact with or knowledge of unauthorized persons on the premises." In his review, Sgt. Bryant also noted Mr. Howe's "whatever it takes" statement to Officer Wihongi.

¶10 Sgt. Bryant decided a false alarm charge was appropriate because Sgt. Bryant judged Mr. Howe "knew [the statements] to be false, and that his intent in doing that was to elicit a response from the Police Department." On July 21, 2003, Sgt. Bryant and another officer went to Peak Alarm's offices. After summoning Mr. Howe to the lobby area, Sgt. Bryant told Mr. Howe he was going to be arrested for making a false alarm. Rather than handcuffing Mr. Howe and taking him into police custody, Sgt. Bryant gave Mr. Howe the opportunity to avoid an arrest by signing and fingerprinting a citation for the misdemeanor of making a false alarm. The fingerprinting process was not equivalent to that used at a formal booking; Sgt. Bryant required a single thumbprint affixed to the citation. Police department policy requires that every misdemeanor citation include a fingerprint from the cited individual.

¶11 A jury trial on the criminal charge began on April 12, 2004. Following the Salt Lake City prosecutor's case in chief, the justice court granted

Mr. Howe's motion for a directed verdict. The justice court dismissed the charge because prosecutors presented "no evidence" Mr. Howe "knowingly or intentionally made . . . a false alarm."

IV. MR. HOWE'S CIVIL SUIT

¶12 On June 25, 2004, Mr. Howe filed a notice of claim with Salt Lake City. In the eight-page notice, Mr. Howe presented a number of claims arising under the federal and state constitutions, as well as state law. A complaint was filed on April 7, 2005. In all, Mr. Howe lodged ten causes of action against five named parties – Salt Lake City; the Police Chief; the Assistant Police Chief; Sgt. Bryant; and Ms. Werner. Mr. Howe's ten claims consisted of: (1) false arrest/false imprisonment; (2) malicious prosecution; (3) violation of the Utah Citizen Participation in Government Act; (4) tortious interference with existing and prospective business relations;[1] (5) intentional infliction of emotional distress; (6) conspiracy to violate constitutional rights; (7) defamation; (8) negligence; (9) deprivation of federal constitutional rights under 42 U.S.C. § 1983;[2] and (10) violations under the Utah Constitution.

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[1] In the district court, Mr. Howe stipulated to the dismissal of this cause of action and it is not part of this appeal.

[2] By the time the district court considered the motions for summary judgment at issue in this appeal, Mr. Howe's § 1983 claims had evolved into eight independent claims arising under

(Continued on following page)

¶13 The parties filed cross motions for summary judgment in the district court. Mr. Howe moved for partial summary judgment on the claims of false arrest and malicious prosecution[3], arguing that the justice court's finding that Salt Lake City presented "no evidence" of Mr. Howe's intent to violate the false-alarm statute conclusively established that the city lacked probable cause to arrest and charge Mr. Howe. Alternatively, Mr. Howe argued that the surrounding circumstances proved Sgt. Bryant lacked probable cause. The district court denied the motion, holding Mr. Howe had failed to prove that the facts known to Sgt. Bryant could not cause a prudent officer to believe an offense had occurred.

¶14 The district court then turned its attention to the motion for summary judgment filed by Salt Lake City. First, Salt Lake City argued for summary judgment on Mr. Howe's state claims based on procedural grounds under the UGIA. The district court granted the motion and dismissed all but one of Mr. Howe's state claims under the UGIA's procedural mandates.[4] Second, Salt Lake City attacked Mr.

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the First, Fourth, and Fourteenth Amendments to the U.S. Constitution.

[3] Mr. Howe also moved for summary judgment on the claims under § 1983. The district court tacitly rejected that motion by granting Salt Lake City's motion for summary judgment and holding the defendants were entitled to qualified immunity under § 1983.

[4] In its order, the district court dismissed Mr. Howe's action arising under the Utah Constitution as part of a UGIA analysis.

(Continued on following page)

Howe's claims arising under 42 U.S.C. § 1983. Again, the district court dismissed all of these claims on the basis of qualified immunity, pleading defects, and the law of respondeat superior and supervisor liability in civil rights cases.

¶15 Mr. Howe has appealed the district court's decisions on these motions. This court has jurisdiction pursuant to Utah Code section 78A-3-102(3)(j) (2008).

ANALYSIS

¶16 A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). "When reviewing a grant of summary judgment, 'we evaluate the evidence and all reasonable inferences fairly drawn from that evidence in a light most favorable to the party opposing summary judgment.'"[5] *Fishbaugh v.*

The court's order, however, addressed the merits of this constitutional claim and does not merely dismiss on immunity grounds. Mr. Howe failed to address the merits of this claim in his appeal. Under rule 24(a)(9) of the Utah Rules of Appellate Procedure, Mr. Howe therefore waived this claim and we do not consider it as part of this appeal. *See Allen v. Friel*, 2008 UT 56, ¶ 7, 194 P.3d 903 ("If an appellant fails to allege specific errors of the lower court, the appellate court will not seek out errors in the lower court's decision.").

[5] A motion for summary judgment on qualified immunity requires application of "special rules" regarding which party has the burden of persuasion and how the reviewing court views the

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Utah Power & Light, 969 P.2d 403, 405 (Utah 1998) (quoting *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982)). We review legal questions for correctness, granting the district court no deference. *S. Utah Wilderness Alliance v. Automated Geographic Reference Ctr.*, 2008 UT 88, ¶ 12, 200 P.3d 643.

I. THE DIRECTED VERDICT IS NOT CONCLUSIVE EVIDENCE AND THE TOTALITY OF EVIDENCE FAILS TO SHOW A LACK OF PROBABLE CAUSE AS A MATTER OF LAW; THE DISTRICT COURT CORRECTLY DENIED MR. HOWE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

¶17 Mr. Howe argues he is entitled to a grant of summary judgment on his false arrest and malicious prosecution claims because Sgt. Bryant and Ms. Werner lacked probable cause to arrest Mr. Howe and have him prosecuted. Specifically, Mr. Howe urges us to find error in the district court's evaluation of probable cause leading to Sgt. Bryant's decision to cite and have Mr. Howe prosecuted for making a false alarm. Mr. Howe's argument takes two forms. First, he contends that the justice court's directed verdict in the criminal case obligated the district court in this case to grant his motion under principles of collateral estoppel. Second, he argues that the directed verdict,

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evidence. *Reynolds v. Powell*, 370 F.3d 1028, 1030-31 (10th Cir. 2004). For clarity, we discuss this standard in Part III before undertaking an analysis of qualified immunity.

coupled with the surrounding circumstances, mandates summary judgment in his favor. We disagree.

A. The Justice Court's "No Evidence" Finding Is Evidence of a Lack of Probable Cause, But Is Not Conclusive Evidence That Mandates Collateral Estoppel

¶18 At oral argument, Mr. Howe's principle argument was that he was entitled to summary judgment solely because Salt Lake City should be collaterally estopped from contesting whether its employees had probable cause to arrest and prosecute him. The exclusive basis of this claim was that despite the opportunity and motivation to introduce evidence showing Mr. Howe knowingly made a false alarm at the criminal trial, Salt Lake City presented "no evidence" of Mr. Howe's criminal intent. Mr. Howe asserts Salt Lake City's inability to present any evidence on his intent to make a false alarm in the justice court is conclusive evidence that Sgt. Bryant and Ms. Werner lacked probable cause to arrest and prosecute him.

¶19 Mr. Howe's argument overlooks the differences in proof required in criminal and civil proceedings. In every criminal case, the law places the burden of proof on the prosecution to prove every element of the charged offense beyond a reasonable doubt. Utah Code Ann. § 76-1-501(1) (2008). In contrast, to prevail in his civil litigation, Mr. Howe must prove by a preponderance of the evidence that Sgt. Bryant and Ms. Werner acted without probable cause. *See Johns*

v. Shulsen, 717 P.2d 1336, 1338 (Utah 1986) ("It is universally recognized that the standard of proof in civil actions is by a preponderance of the evidence.").

¶20 Our legal system turns on what level of proof is required and what party bears that burden. There is significant distance between the burdens imposed in the criminal context and the civil setting. That distance matters. "[T]he failure of the State to prove the elements of the charged crime beyond a reasonable doubt cannot logically estop another fact finder . . . from finding that those same elements were proven by a preponderance of the evidence." *Id.* (holding an acquittal in a criminal case cannot preclude a finding that the same individual violated his parole because a parole hearing is a civil action).

¶21 Mr. Howe, however, contends the burden of proof is immaterial here because the justice court found Salt Lake City failed to present *any* evidence that Mr. Howe knowingly made a false alarm. This argument misses the point. Although Salt Lake City prosecutors were unable to present evidence at trial on the mens rea element of the charged offense, the justice court's finding says nothing about the state of the evidence at the time Sgt. Bryant elected to issue Mr. Howe the citation. The law recognizes that facts, evidence, and inferences made at the time of arrest or in the initial stages of a prosecution may change or even disappear as a case proceeds to trial. *See State v. Standiford,* 769 P.2d 254, 266-67 (Utah 1988) ("[S]ometimes expected evidence just does not materialize."). A result in favor of a defendant in a criminal trial – at

whatever stage of the proceeding – does not translate into an automatic conclusion that the arresting officers and the prosecuting attorneys lacked probable cause to proceed against a defendant at the outset. *See State v. Trane,* 2002 UT 97, ¶ 26, 57 P.3d 1052 ("[A] suspect does not need to be guilty of the offense for which the officers arrested the suspect for the officers to have probable cause to arrest.").

¶22 We are therefore unpersuaded by Mr. Howe's argument that the justice court's decision should estop Salt Lake City from arguing that probable cause existed to arrest and prosecute him. The outcome in the criminal case, standing alone, is not conclusive evidence demanding the application of collateral estoppel. It is, at best, some evidence of a lack of probable cause for an arrest or prosecution that should be considered as part of a larger analysis of the totality of circumstances.[6] *See Olson v. Indep. Order of Foresters,* 7 Utah 2d 322, 324 P.2d 1012, 1014-15 (1958). Thus, the district court correctly rejected Mr. Howe's motion for summary judgment on the sole basis of the justice court's directed verdict.

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[6] While we note that the justice court's ruling may be "some evidence" of a lack of probable cause, we express no opinion on whether this evidence is admissible in any particular proceeding.

B. The Facts Taken in Their Entirety and in a Light Most Favorable to the Defendants, Mr. Howe Failed to Prove Sgt. Bryant Acted Without Probable Cause

¶23 Given that the justice court's decision is not conclusive evidence of a lack of probable cause, we turn to Mr. Howe's alternative argument that no probable cause existed under the totality of the circumstances as a matter of law. Probable cause is often the critical issue in litigation involving false arrest and malicious prosecution. *See Terry v. Zions Coop. Mercantile Inst.,* 605 P.2d 314, 320 (Utah 1979) (stating probable cause is a defense to a claim of false arrest or imprisonment) *overruled on other grounds* by *McFarland v. Skaggs,* 678 P.2d 298, 304-05 (Utah 1984); *Callioux v. Progressive Ins. Co.* 745 P.2d 838, 843 (Utah Ct. App. 1987) (holding a plaintiff must demonstrate a want of probable cause to prevail on a claim of malicious prosecution). The probable cause standard is constant regardless of the point at which it is required by the law. *See State v. Virgin,* 2006 UT 29, ¶ 18, 137 P.3d 787 (stating "probable cause means probable cause" and specifically holding that probable cause mandated at a preliminary hearing is the same as that required for an arrest warrant).

¶24 Given this consistency, our description of probable cause justifying an arrest and prosecution mirrors the standard derived from the Fourth Amendment. *See Trane,* 2002 UT 97, ¶¶ 26-27, 57 P.3d 1052 (holding that both the Utah Constitution and the Fourth Amendment of the U.S. Constitution

require probable cause to support a warrantless arrest and defining probable cause with reference to federal jurisprudence). Thus, probable cause to effectuate an arrest requires that we objectively review the actions by police by asking "'whether from the facts known to the officer, and the inferences [that can] fairly . . . be drawn therefrom, a reasonable and prudent person in [the officer's] position would be justified in believing that the suspect had committed the offense.'" *Id.* ¶ 27 (quoting *State v. Cole,* 674 P.2d 119, 125 (Utah 1983) (alteration and omission in original)). Therefore, we must determine whether the facts known to Sgt. Bryant and Ms. Werner, along with any fair inferences that may be derived from them, would lead a "'reasonable and prudent person in the officer's position'" to be "'justified in believing that the suspect had committed the offense.'" *Id.* (quoting *Cole,* 674 P.2d at 125 (internal brackets omitted)). Stated differently, to prevail on his motion Mr. Howe must demonstrate that it was unreasonable for Sgt. Bryant and Ms. Werner to conclude he violated state law by making a false alarm.

¶25 Utah's false alarm statute renders a person criminally liable for making a false alarm by reporting a crime or catastrophe while "knowing that the report or warning is false or baseless." Utah Code Ann. § 76-9-105(1). When Mr. Howe called police on June 27, 2003, he falsely reported that a private security guard was at the school and had verified a burglary. Mr. Howe, however, argues that this false statement is not equivalent to a false alarm

contemplated in section 76-9-105; he points out that he did not report a false alarm, as a burglary had in fact occurred. Mr. Howe merely reported – albeit falsely – who had verified the crime. This argument is not without merit. The false alarm statute does not stand for the proposition that a person is subject to criminal prosecution by making any factual misstatements when they call for police assistance. Rather, section 76-9-105 clearly criminalizes the act of reporting a crime with the knowledge that no crime existed.

¶26 Nonetheless, other facts in this case raise questions with regard to probable cause. Mr. Howe told police dispatch that a security guard had verified the burglary. He knew that police would not otherwise respond. From his lobbying activities, Mr. Howe knew the content of the Salt Lake City ordinance. And Mr. Howe's own employee had been told by a police dispatcher, minutes earlier, that police would not respond to unverified burglar alarms by an alarm company. Additionally, Mr. Howe's own "whatever-it-takes" statement could be interpreted by a prudent officer as meaning that Mr. Howe would say anything necessary to persuade police to respond to a mere burglary alarm regardless of whether he believed an actual burglary had occurred. Finally, there are inconsistencies in Mr. Howe's initial statements. Mr. Howe told police dispatch that there was a burglary in progress. By the time Mr. Howe was interviewed by police, he claimed he was reporting a "panic alarm" based on a theory that "someone's life could

potentially be in danger." Given these facts, we cannot conclude as a matter of law that a prudent officer would not have been justified in concluding Mr. Howe reported a crime while knowing it was false.

¶27 This does not mean there are no facts suggesting Sgt. Bryant and Ms. Werner acted without probable cause. Indeed, in Part III we discuss these facts thoroughly. But, given that we must view the facts in a light most favorable to Salt Lake City – the nonmoving party on this motion – we conclude the district court did not err in rejecting Mr. Howe's motion for partial summary judgment.

II. THE DISTRICT COURT ERRED WHEN IT DISMISSED MR. HOWE'S CLAIMS ON PROCEDURAL GROUNDS ARISING UNDER THE UTAH GOVERNMENTAL IMMUNITY ACT

¶28 Mr. Howe next argues that the district court misapplied the procedural requirements of the UGIA to dismiss his state claims. Specifically, Mr. Howe argues the district court erred when it held (1) Mr. Howe failed to sufficiently plead that Sgt. Bryant or Ms. Werner acted with fraud or malice, and (2) Mr. Howe failed to file a sufficiently pled notice of claim within the statutorily mandated time period required by the UGIA.

A. Mr. Howe's Notice of Claim Included Sufficient Allegations that the Government Employees Acted With Fraud or Malice

¶29 Generally, the UGIA operates to shield governmental employees from liability for tortious acts that occur during the course of employment. *See Mecham v. Frazier,* 2008 UT 60, ¶ 14, 193 P.3d 630. This does not mean governmental employees can never be sued in the face of the UGIA. To avoid immunity, a plaintiff must bring suit pursuant to an exception to the UGIA's general grant of immunity. *See id.* ¶ 15. Mr. Howe invokes the exception that abrogates immunity for government employees who act with "fraud or malice." Utah Code Ann. § 63-30-4 (1997).[7] Under the UGIA's mandatory notice-of-claim provision, a claimant wishing to use this exception must reasonably alert the governmental entity employing the alleged tortfeasor that the claims are based on employee fraud or malice. *See id.* § 63-30-4(3)(b); *Mecham,* 2008 UT 60, ¶ 19, 193 P.3d 630 (stating that to reasonably alert the governmental entity of a claim against one of its employees, the

[7] In 2004, the Utah Legislature repealed the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-1 to -38 (1997) and re-enacted the statutory scheme as the Governmental Immunity Act of Utah. Utah Code Ann. §§ 63-30d-101 to -904 (2004). Our citations here will be to the former statute because the former enactment was in effect at the time of Mr. Howe's alleged injuries. *See Peck v. State,* 2008 UT 39, ¶ 1 n.1, 191 P.3d 4.

claim must be "due to the employee's fraudulent or malicious conduct").

¶30 The UGIA's notice-of-claim requirement does not demand "that such notices meet the standards required to state a claim for relief." *Houghton v. Dep't of Health*, 2005 UT 63, ¶ 21, 125 P.3d 860 (internal quotation marks omitted). In *Mecham*, this court held claimants need not specifically use the words "fraud" or "malice" to satisfy this immunity exception. 2008 UT 60, ¶ 19, 193 P.3d 630. "Whether a notice of claim contains an allegation of fraud or malice depends on the content of the notice as a whole." *Id.* ¶ 20.

¶31 Mr. Howe delivered an eight-page notice of claim to the Salt Lake City recorder on June 25, 2004. The district court found this notice of claim failed to assert any claims of fraud or malice and made only "general conclusory statements." We disagree with this characterization. Mr. Howe's notice of claims provided facts alleging malice by Ms. Werner and Sgt. Bryant. For instance, Mr. Howe alleged that Sgt. Bryant lacked facts to support a "good faith" arrest of Mr. Howe. Also, Mr. Howe asserted the purpose of the prosecution was not to bring a criminal to justice but to punish Mr. Howe for his public opposition to Salt Lake City's verified response policy. Moreover, Mr. Howe employed the term malice in his notice of claim when he alleged Salt Lake City acted "for the purpose of harassing, intimidating, punishing, or otherwise *maliciously* inhibiting" Mr. Howe's constitutional rights. (emphasis added.) Finally, Mr. Howe alleged

that Ms. Werner, with the support of her supervisors, "mounted a wideranging and public campaign that features exaggerated, misleading and/or false statements against the alarm industry itself and individuals within the industry."

¶32 These claims were sufficient to alert Salt Lake City that Mr. Howe intended to bring claims against the police department's employees on the basis of malicious conduct within the scope of employment. Therefore, the district court erred in holding that Mr. Howe failed to allege fraud or malice in his June 25, 2004 notice of claim filed with Salt Lake City.

B. Mr. Howe Filed His Notice of Claim Within the Period Mandated by the Utah Governmental Immunity Act

¶33 In addition to meeting one of the UGIA's exceptions that nullifies immunity, a claimant must file the notice of claim "within one year after the claim arises." Utah Code Ann. § 63-30-12 (1997). The district court held that Mr. Howe's notice of claim was statutorily untimely under the UGIA. However, the district court used the date Mr. Howe filed his complaint in Third District Court – April 7, 2005 – rather than the date he filed his notice of claim – June 25, 2004 – as the date of notice of his claims against city employees. The district court's use of the later date is understandable given its conclusion that Mr. Howe's June 25, 2004 notice of claim did not sufficiently

allege fraud or malice. Having found Mr. Howe's notice of claim insufficient, the court used the next document that could satisfy the UGIA's notice-of-claim requirement. That document was Mr. Howe's complaint, which was filed outside of UGIA's one-year mandate.

¶34 Given our holding that Mr. Howe's notice of claim sufficiently alleged malice on the part of Ms. Werner and Sgt. Bryant, the proper date from which to apply UGIA's one-year statute of limitations is the earlier date of June 25, 2004. Therefore, to be timely under the UGIA, Mr. Howe's claim must have arisen within the single year preceding the June 25, 2004 filing. All of the events giving rise to Mr. Howe's claims occurred within one year of that date.

¶35 Mr. Howe's notice was timely under the UGIA. We therefore reverse the district court's grant of Salt Lake City's motion for summary judgment under the UGIA and remand Mr. Howe's state claims* to the district court.

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* Those causes of action are: (1) false arrest/imprisonment; (2) malicious prosecution; (3) violation of the Citizens Participation in Government Act; (4) defamation; (5) intentional infliction of emotional distress; (6) conspiracy; and (7) negligence.

III. MR. HOWE'S UNLAWFUL SEIZURE CLAIM SURVIVES QUALIFIED IMMUNITY, BUT THE DISTRICT COURT PROPERLY DISMISSED HIS REMAINING § 1983 CLAIMS

¶36 Congress enacted 42 U.S.C. § 1983 "'to protect the people from unconstitutional action under color of state law.'" *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)). Section 1983 creates a "federal cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution.'" *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755 (2005) (quoting 42 U.S.C. § 1983 (2006)). Mr. Howe used § 1983 as a basis for eight independent claims alleging civil rights violations under the First, Fourth, and Fourteenth Amendments to the U.S. Constitution. Mr. Howe's complaint provides generalized allegations supporting his § 1983 causes of action but does not provide an explicit list of what claims he intended to bring under the federal constitution. We identify eight claims that were briefed and argued in the district court on summary judgment. Those actions are (1) a Fourth Amendment seizure claim, (2) a Fourth Amendment malicious prosecution claim, (3) a Fourteenth Amendment substantive due process claim, (4) a First Amendment retaliation claim, (5) a Fourteenth Amendment stigma plus claim,[9] (6) a First

[9] A stigma plus cause of action is based in part on alleged defamatory statements that cause damage to one's reputation. To arise to a claim covered by § 1983, a plaintiff must show "stigma to his reputation *plus* deprivation of some additional

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Amendment nonretaliation claim, (7) a claim against Salt Lake City under a theory of respondeat superior, and (8) a claim against the former Police Chief and the Assistant Police Chief for supervisor liability.

¶37 The district court dismissed each of Mr. Howe's § 1983 claims. For clarity, we divide these claims into three categories. First, we analyze the claims dismissed under the doctrine of qualified immunity. Second, we address the claims dismissed for insufficient pleading. Finally, we conclude with a discussion of the claims against Sgt. Bryant's and Ms. Werner's supervisors and Salt Lake City.[10]

A. Qualified Immunity

¶38 While the text of § 1983 is silent on the issue of immunity, courts recognize two distinct forms of governmental immunity arising under federal law. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). In this appeal we are only concerned with qualified

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right or interest." *Dee v. Borough of Dunmore*, 549 F.3d 225, 233-34 (3d Cir. 2008). Thus the name stigma plus.

[10] We do not consider Mr. Howe's First Amendment retaliation claim because he failed to address that claim on appeal. An appellant waives a claim by failing to provide the appellate panel with "contentions and reasons" supporting a reversal of the lower court. Utah R. App. P. 24(a)(9); *Allen v. Friel*, 2008 UT 56, ¶ 7, 194 P.3d 903 ("If an appellant fails to allege specific errors of the lower court, the appellate court will not seek out errors in the lower court's decision.").

immunity and its application to Ms. Werner and Sgt. Bryant.

¶39 Generally, public employees are entitled to the protection of qualified immunity because the doctrine "represents the norm" for governmental employees. *Malley v. Briggs,* 475 U.S. 335, 340 (1986) (internal quotation marks omitted). Qualified immunity does not operate merely as a defense to liability; it is a shield from suit. *See Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). Indeed, "the 'driving force' behind [the] creation of the qualified immunity doctrine was a desire to ensure that '"insubstantial claims" against government officials [will] be resolved prior to discovery.'" *Pearson v. Callahan,* 129 S.Ct. 808, 815 (2009) (alteration in original omitted) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 n.2 (1987)). The doctrine of qualified immunity operates by insulating government employees "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

¶40 Whether a government official is entitled to qualified immunity turns on a two-part analysis. *See Pearson,* 129 S.Ct. at 815-16. In the first part of this test[11], the reviewing court is required to determine

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[11] Until early 2009, the Supreme Court mandated the two-part test be conducted sequentially. *Pearson v. Callahan,* 129 S.Ct. 808, 815-816 (2009). In *Pearson,* the Supreme Court reaffirmed the two-part analysis but held that trial courts were

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whether the facts, as alleged by the plaintiff, "make out a violation of a constitutional right." *Id.* In other words, the court must ask what is the constitutional right at stake and whether the facts support a claim that the right was violated. In the second part, the court must determine if the alleged right was "clearly established at the time" of the government official's alleged misconduct. *Id.* at 816 (internal quotation marks omitted).

¶41 In analyzing qualified immunity a court must apply "special rules" involving the burden of proof on summary judgment. *Reynolds v. Powell,* 370 F.3d 1028, 1030 (10th Cir. 2004) (internal quotation marks omitted). Generally, the moving party on a motion for summary judgment has the burden to prove that it is entitled to judgment as a matter of law, and the court evaluates the evidence and reasonable inferences in a light most favorable to the nonmoving party. Utah R. Civ. P. 56(c); *Fishbaugh v. Utah Power & Light,* 969 P.2d 403, 405 (Utah 1998). Under qualified immunity the court still views the evidence in a light most favorable to the nonmoving party. *See Reynolds,* 370 F.3d at 1030-31. In contrast to the general rule of procedure, once a defendant claims qualified immunity, the plaintiff always has the burden of proving that immunity is improper

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no longer required to strictly comply with the sequential analysis. *Id.* at 818 (stating judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first").

under the two-part test. *See Cortez v. McCauley*, 478 F.3d 1108, 1114 (10th Cir. 2007) (en banc). Thus, the plaintiff must (1) demonstrate that the facts alleged make out a violation of a constitutional right and (2) prove the right was clearly established at the time of the purported violation. Plaintiffs are not required to prove they are entitled to win at this point. Rather, the reviewing court considers whether the facts alleged, if true, would amount to a constitutional violation clearly established at the time of the alleged misconduct. *See Reynolds*, 370 F.3d at 1030 ("As a threshold matter, plaintiff must therefore demonstrate that he has presented sufficient facts to show that defendants' conduct violated" a constitutional right.).

¶42 The district court in this case dismissed four of Mr. Howe's § 1983 claims under qualified immunity. Those claims are: (1) unlawful seizure; (2) malicious prosecution; (3) violation of substantive due process; and (4) First Amendment retaliation. With the exclusion of Mr. Howe's retaliation claim, which he failed to raise on appeal, we discuss each of these claims separately.

1. Sgt. Bryant and Ms. Werner Are Not Entitled to Qualified Immunity on Mr. Howe's § 1983 Seizure Claim

¶43 The district court dismissed Mr. Howe's § 1983 unlawful seizure claim, holding the government employees were entitled to qualified immunity

because Mr. Howe failed to show the actions of Sgt. Bryant and Ms. Werner amounted to a violation of his Fourth Amendment right against unreasonable seizure. First, the district court found that Mr. Howe was not seized within the meaning of the Fourth Amendment. Second, the district court found that, even if a seizure occurred, Mr. Howe failed to show Sgt. Bryant and Ms. Werner acted without probable cause.

¶44 We must first determine whether the actions by the police on June 27, 2003 constituted a seizure, and, if so, whether the seizure was unreasonable. *See Fuerschbach v. Sw. Airlines Co.*, 439 F.3d 1197, 1202 (10th Cir. 2006). The gravamen of a Fourth Amendment seizure is whether "a reasonable person would have believed that he was not free to leave" under all of the surrounding circumstances. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (internal quotation marks omitted); *see also Reeves v. Churchich*, 484 F.3d 1244, 1259 (10th Cir. 2007) ("A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the encounter, a reasonable person would have believed he was not free to leave, decline the officers' requests or otherwise terminate the encounter.").

¶45 In determining that Mr. Howe was not subject to a seizure, the district court referenced *Martinez v. Carr.* In that case, the Tenth Circuit Court of Appeals considered whether the issuance of a misdemeanor citation alone amounts to a seizure

under the Fourth Amendment. *Martinez v. Carr,* 479 F.3d 1292, 1295 (10th Cir. 2007). In *Martinez,* a number of police officers seized the plaintiff by initially detaining him, physically restraining him, and escorting him to a "police post." *Id.* Another officer, who played no role in the initial seizure of the plaintiff, issued the plaintiff a citation and released him from detention. *Id.* The plaintiff brought a § 1983 action against the officer who issued the citation, but not against any of the officers involved in the initial seizure. *Id.* The basis for a seizure by the defendant officer was the fact that he issued the plaintiff a citation under a threat that the plaintiff would be formally arrested if he refused to accept the citation. The Tenth Circuit held the citation was a release from detention and could not be construed as an independent seizure. *See id.* at 1296 ("[T]he upshot of the officer's actions was that the defendant was given the freedom to choose not to be arrested and instead leave without any restrictions on his movement." (emphasis omitted)). Thus, *Martinez* stands for the proposition that the lawful issuance of a citation, standing alone, cannot constitute an independent seizure. *Martinez,* however, does not stand for the proposition that the issuance of a citation vitiates the effect of any preceding seizure. *See id.* at 1295 (stating it is undisputed that other officers seized the plaintiff but the plaintiff failed to bring an action against those officers).

¶46 In this case, Mr. Howe relies on the circumstances surrounding the issuance of the citation as a

basis for his seizure claim. While we agree with the district court that Sgt. Bryant did not seize Mr. Howe simply by issuing the citation, we believe that there are facts to support a conclusion that he did seize Mr. Howe briefly before issuing the citation. The defendants do not dispute that, upon summoning Mr. Howe to the Peak Alarm lobby, Sgt. Bryant told Mr. Howe that he intended to "arrest" him. There is some dispute in the record about what occurred next. Sgt. Bryant claims to have immediately told Mr. Howe that he would be released on a citation "if that was his preference." Mr. Howe claims Sgt. Bryant repeated the statement and the two began arguing about the merits of the citation before Sgt. Bryant told him that he could avoid going to jail by signing a citation. Since we must take the facts as alleged by Mr. Howe as true at this stage, we conclude that those facts support a claim that Sgt. Bryant seized Mr. Howe for a brief period before beginning the process of issuing Mr. Howe a citation. No reasonable person would believe he was free to leave after an officer states he intends to arrest him. Indeed, Sgt. Bryant stated Mr. Howe was not free to leave during the July 27 exchange and had Mr. Howe attempted to leave it is likely Sgt. Bryant would have arrested him.

¶47 Accordingly, Mr. Howe has alleged facts that support a claim that Sgt. Bryant violated his constitutional right to be free from an unreasonable seizure. Thus, the district incorrectly determined that no seizure occurred on June 27. This showing,

however, is sufficient only to satisfy the first part of the qualified-immunity test as we do not decide Mr. Howe's seizure claim as a matter of law. Whether Mr. Howe was seized is a factual question that must be resolved in the district court.

¶48 This does not conclude our analysis of whether Mr. Howe successfully made out a violation of a constitutional right under qualified immunity. We must also consider whether the seizure was unreasonable or, in other words, whether Mr. Howe provided sufficient facts to demonstrate Sgt. Bryant lacked probable cause for the arrest. If probable cause existed, then the seizure was reasonable; if not, the seizure was unreasonable and exceeded constitutional bounds. *See Herring v. United States,* 129 S.Ct. 695, 698 (2009) (stating that the Fourth Amendment generally requires police to have probable cause to make an arrest); *Buck v. City of Albuquerque,* 549 F.3d 1269, 1281 (10th Cir. 2008) ("[W]hen a warrantless arrest is the subject of a § 1983 action, . . . a plaintiff must prove that the officer(s) lacked probable cause.").

¶49 "Probable cause is based on the totality of circumstances" and employs an objective test questioning whether a reasonable officer would believe the arrested individual has committed a crime. *Cortez,* 478 F.3d at 1116. Indeed, "'[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.'" *Buck,* 549 F.3d at 1281 (quoting *Henry v. United States,* 361 U.S. 98, 102 (1959));

see Fogarty v. Gallegos, 523 F.3d 1147, 1156 (10th Cir. 2008).

¶50 Thus, the question here is whether a reasonable officer – operating under the facts facing Sgt. Bryant at the time – would have seized Mr. Howe. Sgt. Bryant found two statements by Mr. Howe critical in reaching his decision to charge Mr. Howe with making a false alarm. First, Mr. Howe falsely stated that a private security guard had verified a burglary at the school. Second, Mr. Howe stated, "[w]hatever it takes, I thought it was a panic alarm." These two statements, however, are only part of the totality of the circumstances.

¶51 Other circumstances demonstrate that the statements about the security guard's purported presence at the school were the product of an incorrect assumption on Mr. Howe's part, not a knowing misrepresentation. Tellingly, within minutes of Mr. Howe's initial call to police, he expressly informed a police dispatcher that the information about the security guard had been incorrect.

¶52 Moreover, to determine whether probable cause existed under the totality of these circumstances, the statute Sgt. Bryant used to cite Mr. Howe must be considered.[12] The false alarm statute imposes

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[12] In evaluating an unlawful seizure claim under § 1983, courts must consider which crimes the police "could objectively and reasonably have believed [the plaintiff] committed." *Fogarty v. Gallegos*, 523 F.3d 1147, 1156 (10th Cir. 2008) (evaluating

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criminal liability when (1) an individual reports a crime, (2) the individual knows the report is false or baseless, and (3) the individual knows the report will prompt action by police. Utah Code Ann. § 76-9-105(1) (2008). There can be no doubt – and therefore it was reasonable for Sgt. Bryant to conclude – Mr. Howe meets the first and third elements of this statute. After all, Mr. Howe reported a burglary in progress and the point of Mr. Howe's call was to prompt police to respond.

¶53 Whether Mr. Howe knew his report to police dispatch on June 27, 2003, was false or baseless is a much closer question. The plain language of Utah's false-alarm statute criminalizes the acts of those who report a crime with knowledge the report (of the crime) is false or baseless. *Id.* This statute does not criminalize mere false statements. As an

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whether police had probable cause to seize a protestor for disorderly conduct when the protestor was never charged with an offense). Considering potential, uncharged offenses is logical when the alleged criminal activity and arrest occur within a narrow time frame because the court is asking whether a reasonable officer would have made an arrest under the circumstances. We do not believe, and the parties here have not argued, that it is necessary to consider other crimes Mr. Howe could have been charged with. In this case, nearly a month passed between the time Mr. Howe summoned police to West High School and when Sgt. Bryant cited and allegedly seized Mr. Howe for making a false alarm. Additionally, Sgt. Bryant and Ms. Werner specifically rejected charging Mr. Howe under Salt Lake City's verified response ordinance and believed the false alarm statute was the only possible charge that could be brought.

illustration, the statute criminalizes the actions of a homeowner who reports a fire while knowing no fire exists. In contrast, we cannot read the statute to reach a homeowner who calls in a fire but reports that the fire's origin was in the kitchen when it in fact started in a different room. Although the homeowner makes a false statement in the latter example, police would lack probable cause to arrest for making a false alarm because the homeowner did not make the call knowing the report of a fire was false or baseless. The linchpin to criminal culpability under Utah Code section 76-9-105 is the caller's subjective knowledge that the report is false or baseless as to the existence of a crime. Taking the facts presented by Mr. Howe as true, as we must, we conclude that they tend to show he believed a burglary was occurring at West High School.

¶54 Our decision here, as it was in Part I, is largely conditioned on the burden imposed under the analysis. Unlike Part I, we must accept the facts as presented by Mr. Howe as true in this part of our analysis. *See Fuerschbach,* 439 F.3d at 1203 ("When reviewing an assertion of qualified immunity . . . we are bound to take the plaintiff's allegations as true."). Mr. Howe has claimed, and has presented supporting facts, that he subjectively believed a burglary occurred at the school, and relayed that information to police. Sgt. Bryant and Ms. Werner simply disregarded this construction of the facts known to them. When Mr. Howe attempted to contact Ms. Werner directly to explain the events of June 27, 2003, she refused to

respond stating she did not need to listen to Mr. Howe's "rationalization and justification." We believe the facts alleged by Mr. Howe raise at least a jury question on the lack of probable cause and, therefore, make out a constitutional violation of Mr. Howe's right to be free from unreasonable seizure sufficient to survive qualified immunity.

¶55 We now consider the second prong of the qualified immunity test: whether Mr. Howe's right to be free from unreasonable seizure was clearly established at the time of the alleged unlawful conduct. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful under the circumstances presented." *Buck,* 549 F.3d at 1286 (internal quotation marks omitted). The jurisprudence surrounding the Fourth Amendment right against unlawful seizure "was and is unambiguous: a government official must have probable cause to arrest an individual." *Cortez,* 478 F.3d at 1117. Thus, a reasonable officer knows that it is unlawful to arrest an individual without probable cause. Again accepting Mr. Howe's facts as true, Sgt. Bryant detained Mr. Howe without probable cause. Lacking probable cause, the seizure of Mr. Howe was a violation of a clearly established right. *See Buck,* 549 F.3d at 1286-87.

¶56 In sum, Mr. Howe has presented facts that tend to show Sgt. Bryant violated his Fourth Amendment right to be free from unreasonable seizure, a right clearly established at the time of Sgt. Bryant's

alleged misconduct. Thus, the district court erred when it dismissed Mr. Howe's unreasonable seizure claim under qualified immunity.

2. Sgt. Bryant and Ms. Werner Are Entitled to Qualified Immunity on Mr. Howe's Malicious Prosecution Claim

¶57 Under federal jurisprudence, a § 1983 malicious prosecution claim lies within the protections provided in either the Fourth or Fourteenth Amendments. "The initial seizure is governed by the Fourth Amendment, but at some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Due Process Clause." *Pierce v. Gilchrist*, 359 F.3d 1279, 1285-86 (10th Cir. 2004) (internal citation omitted). In this appeal, Mr. Howe limited his malicious prosecution claim to the Fourth Amendment and disavows any connection to the due process protections of the Fourteenth Amendment. Thus, we restrict our analysis to the Fourth Amendment.

¶58 A malicious prosecution action based in the Fourth Amendment requires a seizure pursuant to legal process or some interference with individual liberties. "A groundless charging decision may abuse the criminal process, but it does not, in and of itself, violate the Fourth Amendment absent a significant restriction on liberty." *Becker v. Kroll*, 494 F.3d 904, 915 (10th Cir. 2007); *see also Nielander v. Bd. of County Comm'rs*, 582 F.3d 1155, 1164-65 (10th Cir.

2009) (stating a plaintiff "must prove that he was also seized in order to prevail" on a claim of malicious prosecution claim based on the Fourth Amendment).

¶59 What complicates this analysis is that a detention giving rise to a claim of unlawful seizure does not necessarily create a seizure for malicious prosecution purposes. *See Wilkins v. DeReyes,* 528 F.3d 790, 799 n.5 (10th Cir. 2008) (recognizing that a malicious prosecution claim is "a second Fourth Amendment claim" that comes "on the heels of" a false arrest or imprisonment claim). The line separating a cause of action for false arrest and one for malicious prosecution is the "institution of legal process." *Id.* at 798; *see also Wallace v. Kato,* 549 U.S. 384, 389-90 (2007) (distinguishing between false imprisonment which "ends once the victim becomes held pursuant to such process" and the "entirely distinct tort of malicious prosecution" which is based on "wrongful institution of legal process" (emphasis and internal quotation marks omitted)). With this distinction in mind, federal courts have held a cause of action for malicious prosecution under the Fourth Amendment can only be maintained when the plaintiff is detained "after the wrongful institution of legal process." *Young v. Davis,* 554 F.3d 1254, 1257 (10th Cir. 2009); *see Wilkins,* 528 F.3d at 798; *McNally v. Colo. State Patrol,* 122 F. App'x 899, 903 (10th Cir. 2004) ("A malicious-prosecution suit . . . 'permits damages for confinement imposed pursuant to legal process.'") (quoting *Heck v. Humphrey,* 512 U.S. 477, 484 (1994)).

¶60 Hence, a malicious prosecution claim based on the Fourth Amendment is viewed as a seizure, as a consequence of the improper use of legal process. Therefore, as a threshold matter, Mr. Howe's malicious prosecution claim will not survive the first prong of the qualified immunity test if Mr. Howe failed to show he was detained after the institution of legal process in his false alarm prosecution. The brief detention Mr. Howe was subjected to before the issuance of the citation occurred before the initiation of any legal process. The only other fact giving rise to an inference of a seizure is the fact that Sgt. Bryant retained Mr. Howe's driver's license after issuing the citation. Mr. Howe has failed to present any facts contradicting the district court's holding that the retention of Mr. Howe's driver's license was inadvertent and caused no restriction on any of Mr. Howe's liberties.

¶61 Some federal courts have recognized a theory of continuing seizure as a constitutional violation in the absence of physical restraint. *See Penberth v. Krajnak,* 347 F. App'x 827, 829 (3d Cir. 2009). This theory was first advocated by Justice Ginsburg in *Albright v. Oliver,* 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring), and is founded on the pre-trial control the state exercises over an individual defendant. Such a seizure "for Fourth Amendment purposes include[s] requiring a person to post bond, compelling a person to appear in court, or imposing restrictions on a person's right to interstate travel." *Becker,* 494 F.3d at 915 (interpreting Justice

Ginsburg's concurrence). Some circuits have expressly rejected continuing seizure as a means to pursue a malicious prosecution action under the Fourth Amendment. *See Nielander*, 582 F.3d at 1165. Even those courts that have adopted continuing seizure as a legally cognizable injury do so "only when criminal charges are coupled with another significant restraint on liberty, such as restrictions on travel." *Becker*, 494 F.3d at 916; *see Bielanski v. County of Kane*, 550 F.3d 632, 638-42 (7th Cir. 2008) (surveying treatment of continuing seizure by the circuits before rejecting the theory in the Seventh Circuit).

¶62 Even if we were to recognize the doctrine of continuing seizure, the facts in this case are inadequate to show such a seizure occurred. *See Penberth*, 347 F. App'x at 329 (holding there was no seizure where the individual (1) was detained for forty minutes but not arrested, (2) did not have to post bail [or] communicate with pre-trial services, and (3) had no travel restrictions imposed). Mr. Howe was momentarily detained. Mr. Howe was subject to no additional restrictions on his movement once the citation was issued. Therefore, Mr. Howe was subject to neither a continuing seizure nor a seizure pursuant to legal process that would support a claim of malicious prosecution under the Fourth Amendment. The district court did not err in finding that the individual defendants were entitled to qualified immunity on Mr. Howe's malicious prosecution action.

3. Sgt. Bryant and Ms. Werner Are Entitled to Qualified Immunity on Mr. Howe's Substantive Due Process Claim

¶63 The district court also dismissed Mr. Howe's substantive due process claim, holding that Mr. Howe had "failed to show any extreme conduct" by the defendants. Mr. Howe urges us to revive this claim under a theory that the defendants did not bring the false-alarm charge against him because they believed he was guilty. Rather, Mr. Howe contends the charge was "intended to punish" him for his public opposition to Salt Lake City's verified response program and to silence other opposition from the private alarm sector. The district court dismissed Mr. Howe's substantive due process claim, holding that he had not alleged facts showing any conduct by Sgt. Bryant or Ms. Werner sufficient to make out a substantive due process violation as required by the first prong of the qualified immunity doctrine.

¶64 It is well settled that the Fourteenth Amendment's protection of life, liberty, and property gives rise to substantive due process claims. *See Graves v. Thomas,* 450 F.3d 1215, 1220 (10th Cir. 2006). "The ultimate standard for determining whether there has been a substantive due process violation is whether the challenged government action shocks the conscience" of the reviewing judge. *Moore v. Guthrie,* 438 F.3d 1036, 1040 (10th Cir. 2006) (internal quotation marks omitted). The shock-the-conscience standard is purposefully vague and is intended to evolve over time. *See Livsey v. Salt Lake*

County, 275 F.3d 952, 958 (10th Cir. 2001). Federal courts, however, have provided a number of guideposts for this analysis. Ordinary negligence is never sufficient to shock the conscience. *Ruiz v. McDonnell,* 299 F.3d 1173, 1184 (10th Cir. 2002). Also insufficient are "'incorrect or ill-advised . . . decisions.'" *Uhlrig v. Harder,* 64 F.3d 567, 573 (10th Cir. 1995) (quoting *Collins v. City of Harker Heights,* 503 U.S. 115, 129 (1992)). Indeed,

> "a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. The plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking. This is a high level of outrageousness."

Ward v. Anderson, 494 F.3d 929, 937-38 (10th Cir. 2007) (quoting *Camuglia v. City of Albuquerque,* 448 F.3d 1214, 1222-23 (10th Cir. 2006)).

¶65 Intentionally using criminal charges as an instrument to oppress opposition to government is well within the prohibitions considered part of substantive due process. *See Bell v. Johnson,* 308 F.3d 594, 608 (6th Cir. 2002) (finding an "egregious abuse of governmental power" when an inmate was framed and subjected to prolonged imprisonment as retaliation for his complaints about prison conditions). Thus, Mr. Howe's legal theory concerns conscience shocking behavior. Qualified immunity, however, requires Mr. Howe to support his cause of action with facts that

make out a violation of a constitutional right. In the district court, as on appeal, Mr. Howe's entire argument on this point is:

> In this case, Plaintiffs have developed substantial evidence that would enable the jury to conclude that Defendants intended to punish Jeff Howe for his political speech, as [Ms.] Werner put it, to send 'a signal to other alarm companies.' Such motives are unjustifiable by any legitimate government interest and, therefore, shock the conscience.

This argument is merely a restatement of Mr. Howe's legal theory for his substantive due process claim and fails to identify any fact supporting his theory beyond Ms. Werner's statement, which contains no indication that the "message" in question had anything to do with prosecuting innocent people.

¶66 Moreover, Mr. Howe has taken Ms. Werner's statement out of context. Mr. Howe's abbreviated version of Ms. Werner's statement suggests Ms. Werner wanted to put the alarm industry on notice that opposition to the verified response program would be met by criminal penalties in Salt Lake City. Ms. Werner's complete statement provides an alternative interpretation. She stated, "I'm hoping for the enforcement of our ordinance that it [sic] goes well. If the jury lets Peak Alarm off the hook, to me that's a signal to other alarm companies to call Salt Lake City police and tell them whatever they want." Ms. Werner's statement evidently goes to a concern about the

message sent by the legal process as opposed to a message from the city to the alarm industry.

¶67 Mr. Howe has never provided any additional analysis drawing on other facts in the record that suggest the defendants targeted him as a means of oppressing opposition to the verified response program. This court has interpreted Utah Rule of Appellate Procedure 24(a)(9) to require appellants to present meaningful analysis because the appellate courts of this state are not depositories in which "the appealing party may dump the burden of argument and research." *State v. Jaeger,* 1999 UT 1, ¶ 31, 973 P.2d 404 (internal quotation marks omitted); *see also State v. Garner,* 2002 UT App 234, ¶ 12, 52 P.3d 467 ("When a party fails to offer any meaningful analysis regarding a claim, we decline to reach the merits."). Absent additional direction by Mr. Howe, we cannot conclude that the district court erred in finding he had failed to show the defendant's conduct shocked the conscience.

B. Insufficient Pleading

¶68 The district court dismissed Mr. Howe's Fourteenth Amendment stigma plus claim and his First Amendment non-retaliation action on the basis that neither claim was sufficiently pled under Utah's notice pleading standard. Specifically, the district court found that Mr. Howe raised both of these claims for the first time in his pleading in opposition to Salt Lake City's motion for summary judgment.

¶69 "A plaintiff is required, under our liberal standard of notice pleading, to submit a 'short and plain statement . . . showing that the pleader is entitled to relief' and 'a demand for judgment for the relief.'" *Canfield v. Layton City,* 2005 UT 60, ¶ 14, 122 P.3d 622 (quoting Utah R. Civ. P. 8(a)). The plaintiff must provide the defendant "fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Williams v. State Farm Ins. Co.,* 656 P.2d 966, 970 (Utah 1982) (internal quotation marks omitted).

¶70 We have not previously had an opportunity to review how Utah's liberal pleading standard interacts with claims pled under § 1983. Claims sounding in § 1983 "pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants." *Robbins v. Okla. ex rel. Dep't of Human Servs.,* 519 F.3d 1242, 1249 (10th Cir. 2008). Despite the complex nature of these claims, the Federal Rules of Civil Procedure impose no heightened pleading standard for § 1983 actions. *See Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit,* 507 U.S. 163, 168 (1993) (holding the federal rules only require a "short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" (internal quotation marks omitted)). We think the federal conclusion is appropriate and therefore hold that the Utah Rules of

Civil Procedure likewise do not impose a heightened pleading standard on claims sounding in § 1983.[13] Thus, all that is required of a plaintiff bringing a § 1983 cause of action is to give the opposition "fair notice" of the claims against them. *Williams,* 656 P.2d at 971.

¶71 Having settled the pleading requirement for a § 1983 claim under the Utah Rules of Civil Procedure, we turn to the merits of the district court's dismissal, first addressing Mr. Howe's nonretaliation claim and then his stigma plus action.

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[13] In 2007, the U.S. Supreme Court adopted a new pleading standard for cases arising under the Sherman Act, i.e., antitrust cases. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). That standard requires plaintiffs to plead "only enough facts to state a claim to relief that is *plausible* on its face." *Id.* (emphasis added). While this plausibility standard arose within an antitrust case, some circuit courts of appeals have applied the plausibility standard to all civil cases arising under federal law. *See Bryson v. Gonzales,* 534 F.3d 1282, 1286 (10th Cir. 2008) (applying the plausibility standard to a plaintiff's claims arising in § 1983); *Phillips v. County of Allegheny,* 515 F.3d 224, 234 (3d Cir. 2008) (holding the same); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.,* 507 F.3d 117, 121 (2d Cir. 2007) (holding a complaint must allege facts that "actively and plausibly suggest" the defendant violated the law).

Our holding here is not an indication that we adopt the Supreme Court's plausibility standard. Our reference to the Federal Rules of Civil Procedure is only for the purpose of agreeing that § 1983 claims require no heightened pleading standard.

1. Mr. Howe's Complaint Failed to Give Salt Lake City Notice of a Nonretaliation Claim Based on the First Amendment

¶72 Mr. Howe asserts his First Amendment nonretaliation claim is based on a theory that Ms. Werner's statements about Peak Alarm and Mr. Howe were designed to suppress opposition to the verified response program. This claim is based on Ms. Werner's statements alone and is entirely independent of Mr. Howe's detention and prosecution.

¶73 Mr. Howe's Amended Complaint referenced the First Amendment. This reference and the adjoining allegations of this complaint put Salt Lake City on notice that Mr. Howe intended to bring a First Amendment retaliation claim under a theory that Sgt. Bryant detained and subjected Mr. Howe to prosecution as punishment for speaking publicly against the verified response program. At summary judgment, and on appeal, Mr. Howe attempted to create an entirely separate First Amendment claim based on Ms. Werner's alleged defamatory statements. We have serious doubts that the alleged defamation in this case can create a constitutional violation giving rise to a § 1983 action. *See Paul v. Davis,* 424 U.S. 693, 701 (1976) (declining to create a cause of action under § 1983 "wherever the State may be characterized as the tortfeasor"). Moreover, we are unable to read Mr. Howe's Amended Complaint as giving Salt Lake City fair notice of a claim under the First Amendment based on Ms. Werner's allegedly injurious statements. Thus, the trial court did not err in dismissing Mr. Howe's nonretaliation claim.

2. While Mr. Howe Adequately Pled His Stigma Plus Claim, the District Court Did Not Err by Dismissing the Claim Because Mr. Howe Pled the Action as a Substantive Due Process Violation

¶74 A stigma plus claim is based on the liberty protections found in the Fourteenth Amendment and is at issue when "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Gwinn v. Awmiller,* 354 F.3d 1211, 1216 (10th Cir. 2004) (internal quotation marks omitted). A harm to one's reputation alone does not create a stigma plus violation. *See Paul v. Davis,* 424 U.S. at 701. The plaintiff also must allege an injury to a liberty or property interest to invoke the protections of the Due Process Clause. *See id.* Thus, to prove a stigma plus violation, a plaintiff is required to show (1) the government made a "derogatory" and false statement designed to injure the plaintiff's reputation; and (2) the plaintiff "experienced some governmentally imposed burden that significantly altered his or her status as a matter of state law." *Gwinn,* 354 F.3d at 1216 (internal quotation marks and alteration omitted).

¶75 Mr. Howe's Amended Complaint alleges (1) Ms. Werner, with the authorization of the police department, engaged in a "campaign" of false statements aimed at maligning Peak Alarm and the entire alarm industry, and (2) these statements amounted to a government-imposed burden. Additionally, Mr. Howe stated this claim was based, in part, on a

Fourteenth Amendment violation including a "deprivation of his liberty without due process of law." These allegations were sufficient to give Salt Lake City fair notice that Mr. Howe intended to bring a stigma plus claim under the Fourteenth Amendment.

¶76 Despite the adequate pleading by Mr. Howe, we affirm the district court's decision on an alternative ground. "It is well settled that an appellate court may affirm the judgment appealed from 'if it is sustainable on any legal ground or theory apparent on the record.'" *Bailey v. Bayles,* 2002 UT 58, ¶ 10, 52 P.3d 1158 (quoting *Dipoma v. McPhie,* 2001 UT 61, ¶ 18, 29 P.3d 1225). In the district court, Mr. Howe presented his stigma plus action as a substantive due process claim. However, under federal law, stigma plus claims arise only within the procedural protections of the Due Process Clause. *See Doe v. Mich. Dep't of State Police,* 490 F.3d 491, 502 (6th Cir. 2007) ("Our review of the caselaw has failed to identify any case that applies the stigma-plus test to a substantive due process claim."); *Gwinn,* 354 F.3d at 1216 (stating government harm to one's reputation may give rise to a "protectible liberty interest . . . that requires procedural due process") (internal quotation marks omitted); *Boyanowski v. Capital Area Intermediate Unit,* 215 F.3d 396, 402 n.1 (3d Cir. 2000) (stating that precedent in the circuit is against recognizing stigma plus as a substantive due process claim). Thus, we affirm the district court's decision to dismiss Mr. Howe's stigma plus claim because Mr. Howe has failed to show a violation of a constitutional

right under a theory of stigma plus as a substantive due process claim.

C. Supervisor Liability and Claims Against Salt Lake City

¶77 Up until this point, our analysis of Mr. Howe's § 1983 claims were those brought against Sgt. Bryant and Ms. Werner individually. Additionally, Mr. Howe attempted to render Salt Lake City liable for a pattern of tortious behavior by the two employees. Mr. Howe also brought a separate cause of action against the former Police Chief and the Assistant Police Chief on the basis of supervisor liability. The district court dismissed these claims. We address both of these actions individually, turning first to Salt Lake City's liability as a municipality.

1. The District Court Correctly Dismissed Mr. Howe's Claim Against Salt Lake City Because the City Lacked Constructive Notice Through a Pattern of Tortious Conduct

¶78 Municipalities may be held liable under § 1983 for civil rights violations. *See Bd. of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997) (stating that "local governmental bodies are 'persons' within the meaning of § 1983"). In considering a revival of Mr. Howe's § 1983 action against Salt Lake City, however, we forgo an analysis of qualified immunity since the defense is unavailable to political

subdivisions. *See Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009).

¶79 Local governments may only be held liable under § 1983 for their "own unconstitutional or illegal policies" leading to an employee's tortious conduct. *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998). In other words, municipalities cannot be held liable under § 1983 pursuant to the traditional tort of respondeat superior. *See Brown*, 520 U.S. at 403. The Supreme Court requires plaintiffs seeking to impose liability on a municipality "under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Id.* A plaintiff may attack a municipal policy or custom in two ways. A plaintiff may attempt a facial attack on the local government's policy, alleging the policy itself is a violation of federal law. *See Barney*, 143 F.3d at 1307; *see also Brown*, 520 U.S. at 404 (holding a plaintiff may attack a "particular municipal action itself" (emphasis omitted)). Alternatively, a plaintiff may saddle a municipality with § 1983 liability despite facially valid policies and customs by demonstrating "deliberate indifference" on the part of the local government. *Barney*, 143 F.3d at 1307.

¶80 Mr. Howe did not bring a facial attack on any Salt Lake City policy as a violation of federal law. Thus, the only avenue left open to Mr. Howe is a theory that "lawful municipal action has led an employee to violate a plaintiff's rights [by] demonstrat[ing] that the municipal action was taken with 'deliberate indifference' as to its known or obvious

consequences." *Brown*, 520 U.S. at 407 (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). "The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Barney*, 143 F.3d at 1307. This standard may be satisfied through a showing of a pattern of tortious conduct that provides city officials with notice through repeated constitutional violations. *See id.* The route to municipal liability under § 1983 through a deliberate indifference argument is a narrow one; the Supreme Court demands application of "rigorous standards of culpability and causation . . . to ensure that the municipality is not held liable solely for the actions of its employee." *Brown*, 520 U.S. at 405.

¶81 The phrase "pattern of tortious conduct" has not been clearly defined. The case law suggests, however, that the local government is on notice of such a pattern only after repeated violations have harmed others in addition to the plaintiff. *See Daskalea v. District of Columbia*, 227 F.3d 433, 441-42 (D.C. Cir. 2000) (finding a pattern of tortious conduct where the governmental entity was previously found to be deliberately indifferent to the sexual abuse of female prisoners, yet did nothing to halt the continued "open and notorious" sexual abuse and harassment); *Barney*, 143 F.3d at 1308 (stating "no pattern of violations existed to put the County

on notice" when officials were unaware of any previous sexual assaults by a deputy); *Crownover v. City of Lindsay*, No. 99-6346, 2000 U.S. App. LEXIS 22390 at *10 (10th Cir. Sept. 1, 2000) (finding the city was not on notice of a pattern of tortious conduct because the city was unaware of any allegations of sexual assault by a deputy until after the plaintiff's allegations surfaced); *Trujillo v. Shields*, No. 97-1309, 1998 U.S. App. LEXIS 31148 at *6-7 (10th Cir. Dec. 11, 1998) (holding a plaintiff's allegations of nonconsensual sexual contact by a police officer with two separate women failed to show "continuing, persistent, and widespread" violations giving rise to deliberate indifference by city officials); *Boyett v. County of Washington*, No. 2:04cv1173, 2006 U.S. Dist. LEXIS 86910 at *105 (D. Utah Nov. 28, 2006) (holding the fact that a prisoner died in custody is insufficient to conclude the county had ample notice of potential prisoner deaths through a pattern of tortious conduct).

¶82 In this case, Mr. Howe alleges the city acted with deliberate indifference to Ms. Werner's "undisputed pattern of defamation" and that the Salt Lake City officials "failed to discipline Ms. Werner." First, we do not see how Ms. Werner's generalized criticism of the alarm industry defamed Mr. Howe or Peak Alarm. Moreover, Mr. Howe has failed to show any pattern of alleged tortious behavior that would put Salt Lake City on notice of repeated constitutional violations. Therefore, the district court did not err in dismissing Mr. Howe's claim against Salt Lake City because city officials did not have actual or

constructive notice of unlawful acts by Ms. Werner giving rise to deliberate indifference.

2. The District Court Did Not Err in Dismissing Mr. Howe's Claim Against the Defendant Supervisors Because Neither the Police Chief Nor the Assistant Police Chief Are Linked to Constitutional Violations by Subordinates

¶83 In limited circumstances, a supervisor may be held liable under § 1983 for the acts of a subordinate. *See Fogarty*, 523 F.3d at 1162. A plaintiff attempting to impose supervisor liability must first demonstrate that the supervisor's subordinates violated a constitutional right held by the plaintiff. *See Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006). Subsequent to this initial showing, the plaintiff "must show an 'affirmative link' between the supervisor and the violation." *Id.* (quoting *Holland v. Harrington*, 268 F.3d 1179, 1187 (10th Cir. 2001)). The affirmative-link mandate is a product of the plain language of § 1983 that only allows "'[i]ndividual liability . . . based on personal involvement in the alleged constitutional violation.'" *Fogarty*, 523 F.3d at 1162 (quoting *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997)). Under § 1983, personal liability is never derived from the mere fact that a supervisor possessed some amount of control over the governmental employee who committed a constitutional violation. *See Serna*, 455 F.3d at 1151 ("[I]t is not enough for a plaintiff merely to show a defendant

was in charge of other state actors who actually committed the violation." (internal quotation marks omitted)). The affirmative-link standard, however, is not so limited that it eliminates all liability that does not involve the supervisor's actual participation in the violation. *See Fogarty*, 523 F.3d at 1162.

¶84 The affirmative-link standard is measured by a two-part showing. First, the analysis focuses on the supervisor's conduct in an attempt to discover whether the supervisor "actively participated or acquiesced in the constitutional violation." *Serna*, 455 F.3d at 1152 (quoting *Holland v. Harrington*, 268 F.3d 1179, 1187 (10th Cir. 2001)). In *Holland v. Harrington*, the Tenth Circuit Court of Appeals held that active participation or acquiescence is proven through a supervisor's direct participation, exercise of control or direction, or a failure to supervise. 268 F.3d at 1187 (citing *Worrell v. Henry*, 219 F.3d 1197, 1214 (10th Cir. 2000)). Second, a supervisor can only be held liable for the acts of a subordinate if the plaintiff establishes that the supervisor "had a culpable state of mind," which is generally shown through deliberate indifference on the part of the supervisor. *Serna*, 455 F.3d at 1154-55. "Deliberate indifference requires that the official 'both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Id.* (quoting *Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003)).

¶85 In the district court, Mr. Howe attempted to impose liability on the former Police Chief and the

Assistant Police Chief for the alleged constitutional violations by Sgt. Bryant and Ms. Werner. Sgt. Bryant and Ms. Werner were their subordinates during the time period relevant to this litigation. Pursuant to Parts III. A. and B., Mr. Howe's only surviving constitutional claim against either of the employees is an action for an unlawful seizure arising under the Fourth Amendment. Therefore, Mr. Howe is required to establish an affirmative link between the unconstitutional seizure and some personal involvement by the supervisors.

¶86 To accomplish this, Mr. Howe directs us to one statement each by the Chief and Assistant Chief. As to the Police Chief, Mr. Howe points to an e-mail he authored, in which he described the alarm industry as "unscrupulous." We find it difficult to see how this e-mail demonstrates active participation or acquiescence in the disputed seizure of Mr. Howe. The e-mail is not directed at Sgt. Bryant or Ms. Werner.[14] Nor does Mr. Howe allege the e-mail ever reached either employee. Further, the e-mail was sent on November 17, 2003, some three months after Mr. Howe's disputed seizure. This e-mail cannot be construed as direct participation in Mr. Howe's seizure or as a failure to supervise an employee. Thus, the district court correctly dismissed Mr. Howe's claim

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[14] The e-mail appears to be a discussion between a number of police chiefs from around the county about whether a national committee should accept funding from the Alarm Industry Association.

against the Police Chief on the basis of supervisor liability.

¶87 Next, Mr. Howe points to an e-mail between the Assistant Chief and Ms. Werner in an effort to suggest that the Assistant Chief encouraged unlawful behavior. That e-mail came in response to a message sent from Ms. Werner to the Assistant Chief and the current Police Chief. Ms. Werner's e-mail is titled "My new motto in regards to the alarm industry" and the text is a quote that states "I never did give anybody hell. I just told the truth and they thought it was hell." The Assistant Chief responded, "I like it." This e-mail was authored on September 21, 2004, nearly fifteen months after the disputed seizure. Mr. Howe directs us to no other facts that demonstrate the Assistant Chief directly participated or acquiesced to an unlawful seizure of Mr. Howe through either his direct participation or failure to supervise Sgt. Bryant and Ms. Werner. Thus, the district court did not err in dismissing Mr. Howe's claim of supervisor liability.

CONCLUSION

¶88 We hold that the trial court correctly rejected Mr. Howe's motion for partial summary judgment on the basis of collateral estoppel and the totality of the circumstances. Mr. Howe was unable to prove as a matter of law that he was arrested and prosecuted without probable cause. But we hold that the district court erred when it dismissed Mr. Howe's

state claims because he in fact provided sufficient notice in a timely manner as required by the UGIA.

¶89 Finally, we affirm in part and reverse in part the district court's ruling on Salt Lake City's motion for summary judgment on Mr. Howe's federal claims sounding in § 1983. We hold that the district court erred in dismissing Mr. Howe's Fourth Amendment seizure claim because Mr. Howe presented facts sufficient to allege that an unlawful seizure occurred. Nonetheless, we affirm the district court's decision to dismiss the remaining claims against Ms. Werner, Sgt. Bryant, their supervisors, and Salt Lake City.

¶90 We therefore remand this case to the district court for disposition of Mr. Howe's state claims as discussed in Part II, note 7, and Mr. Howe's unlawful seizure claim under § 1983.

¶91 Associate Chief Justice Durrant, Justice Wilkins, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

IN THE THIRD JUDICIAL DISTRICT,
SALT LAKE COUNTY
STATE OF UTAH

PEAK ALARM COMPANY, INC., a Utah corporation; JERRY D. HOWE, an individual; and, MICHAEL JEFFREY HOWE, an individual, Plaintiffs, vs. SALT LAKE CITY CORPORATION, a Utah municipal corporation; SHANNA WERNER, an individual; CHARLES F. "RICK" DINSE, an individual; SCOTT ATKINSON, an individual, JAMES BRYANT, an individual; and, JOHN DOES I-X, individuals, Defendants.	**RULING** Case No. 050906433 Judge: L.A. DEVER (Filed Oct. 6, 2008)

The above entitled matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment. Having considered the aforementioned Motions and related Oppositions thereto; and, having heard oral arguments on August 5, 2008, the Court makes the following Ruling.

Background

The Complaint arises from an incident in which Plaintiff, Jeffrey Howe, employee and son of Jerry Howe, owner of Peak Alarm, was arrested for making a false alarm report on June 27, 2003, pursuant to Utah Code Annotated Section 76-9-105[1].

Discussion and Analysis of Plaintiffs' Motion Partial Summary Judgment

Plaintiffs seek partial summary judgment on the following causes of action: (1) False Imprisonment/ False Arrest, and (2) Malicious Prosecution.

Plaintiffs' Claim of False Arrest/Imprisonment

The essential elements of false imprisonment are: (1) the detention or restraint of one against his will and (2) the unlawfulness[2] of the detention or restraint. 32 Am Jur 2d False Imprisonment § 7 (2008); *see also Fuerschbach v. Southwest Airlines*

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[1] "(1) A person is guilty of giving a false alarm if he initiates or circulates a report or warning of any fire, impending bombing, or other crime or catastrophe, knowing that the report or warning is false or baseless and is likely to cause evacuation of any building, place of assembly, or facility of public transport, to cause public inconvenience or alarm or action of any sort by any official or volunteer agency organized to deal with emergencies." [pre May 16, 2002 amendment]

[2] In order for a statute to render an arrest lawful, the arrest "must be effected in accordance with statutory dictates." *Lee v. Langley*, 2005 UT App 339, ¶13, 121 P.3d 33 (citation omitted).

Co., 439 F.3d 1197, 1208 (10th Cir. N.M. 2006) ("False imprisonment involves the unlawful interference with the personal liberty or freedom of locomotion of another. There is no need that the plaintiffs have been held in jail or custody. (internal quotation omitted). There is well established jurisprudence that a good faith defense to false imprisonment and false arrest ordinarily requires a showing of probable cause."); *Lee v. Langley*, 2005 UT App 339, ¶19, 121 P.3d 33, (explaining that false imprisonment is an act intending to confine the other within boundaries fixed by the actor, which results in a confinement while the other is conscious of the confinement or is harmed by it (citations omitted)).

Plaintiffs argue that Sergeant James Bryant ("Bryant") did not have probable cause to arrest Howe because (1) the ruling in the Salt Lake City Justice Court creates such a presumption, (2) there was no evidence that Howe knew that the burglary he reported did not occur, (3) the incorrect information he provided was immaterial to the reported crime, and, (4) because in the totality of the circumstances and considering "what Sergeant Bryant would have discovered through a reasonable investigation and the information known to the other police department employees, no reasonable employee could find probable cause." (Pls.' Mem. In Supp., 26).

Plaintiffs rely on *Olsen v. Independent Order of Foresters*, 324 P.2d 1012, 1013 (Utah 1958), in claiming that the Honorable Paul F. Iwasaki's, Salt Lake

City Justice Court, ruling[3] creates a presumption that there was a lack of probable cause for the arrest.

Olsen is distinguishable from the case before the Court. Specifically, in *Olsen*, appellant was accused of embezzlement in violation of Utah Code Annotated Sections 76-17-1 and 76-17-4 (1953). The court explained:

> It is apparent from a reading of these statutes that the gravamen of the crime of embezzlement is a fraudulent appropriation to one's own use of the property entrusted. This is made perfectly clear by the provisions of [Section] 76-17-10, which reads: "Upon any indictment for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly and under a claim of title made in good faith, even though such claim is untenable."
>
> Appellant herein having openly and avowedly appropriated the money under a claim of title, which, if made in good faith, would not have been guilty of any crime. An acquittal under such circumstances is evidence of lack of probable cause in a suit for

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[3] The Honorable Paul F. Iwasaki concluded that (1) the City failed to produce any evidence establishing criminal intent; (2) the City did not meet the necessary elements to prove that Howe violated 76-9-105(1); and, (3) no evidence was presented that Howe knowingly or intentionally made false representations to Salt Lake City dispatch or made a false alarm as per 76-9-105(1). (Pls.' Ex. 14, 4-5).

> malicious prosecution because it tends to prove that the prosecutor did not have a reasonable belief that a crime was actually committed.

Olsen, 324 P.2d at 1014-15 (citation omitted). The basis of the court's finding of a lack of probable cause was based on the language of the statute, 76-17-10, which clearly specified that it is a "sufficient defense that the property was appropriated openly and avowedly and under a claim of title made in good faith, even though such claim is untenable." Plaintiffs have not cited a similar defense provision related to the false alarm provision. Therefore, Plaintiffs erroneously rely on the conclusion in *Olsen* to assert that Judge Iwasaki's findings create a presumption that there was a lack of probable cause to arrest Howe.

Furthermore, the standard used by Judge Iwasaki in the April 2004, bench trial was that of "beyond a reasonable doubt." "No person accused in the United States may be *convicted of a crime* unless *each element* of the offense has been proven *beyond a reasonable doubt*[4]." *State v. Reyes*, 2005 UT 33, ¶11, 116 P.3d 305 (citation omitted) (emphasis added). The evidence required to show probable cause is relatively low and

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[4] The Utah Supreme Court explained in relevant part that proof beyond a reasonable doubt was more powerful than proving a fact is more likely than not, rather proof beyond a reasonable doubt leaves the fact finder "firmly convinced" of the defendant's guilt. *Id.* at ¶37.

does not require a finding of guilt. *See State v. Ingram*, 2006 UT App 237, ¶13, 139 P.3d 286 (citations omitted); *United States v. Soto*, 375 F.3d 1219, 1222 (10th Cir. 2004).

Plaintiffs further argue that as a matter of law and based upon the totality of circumstances there was a lack of probable cause. Plaintiffs fail to present any persuasive argument to support their assertions. Rather, Plaintiffs present arguments that press the Court to weigh evidence and assess the credibility of Defendants. *See Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984) (citations omitted) (explaining that under Utah Rules of Civil Procedure 56(c), the trial court must not weigh evidence or assess credibility). For example, Plaintiffs write:

- Based on his experience, Sergeant Bryant would likely have known that West High School is a large building with multiple exits.
- Based on his training and experience, Sergeant Bryant would have likely known that seven officers cannot both secure all of the exits and thoroughly search a building as large and with as many exists [sic] as West High.
- In addition, based only on the amount of time taken, Sergeant Bryant would likely have known that the search was relatively cursory, because a thorough and detailed search of a building as large as

West High is likely very time consumptive.

- Officer Wihongi's report lacked detail regarding the individuals who reported the unknown suspects had entered the building, which indicated that Officer Wihongi did not contact or did not focus on those people.

(Pls.' Mem. In Supp., 40).

The evidence required to show probable cause is relatively low because the assumption is that the prosecution's case will only get stronger as the investigation continues. *Ingram*, 2006 UT App at ¶13, 139 P.3d 286 (quotation omitted) (original citations omitted). "Probable cause exists where *the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient* to warrant a prudent [officer] in believing that an offense has been or is being committed." *Karr v. Smith*, 774 F.2d 1029, 1031 (10th Cir. 1985) (emphasis added). This is an objective standard. The subjective belief of an individual officer as to whether there is probable cause is not dispositive. *United States v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999). Probable cause is measured against an objective standard and is evaluated "in relation to the circumstances as they would have appeared to prudent, cautious and trained police officers." *Id.* (quotation omitted). Importantly, probable cause *does not require* facts sufficient for a finding of guilt. *Soto*, 375 F.3d at 1222 (emphasis added).

"To show probable cause for intent, the State must only prove that its theory of intent is reasonable." *Ingram*, 2006 UT App at ¶17, (citations omitted). "Knowledge or intent is a state of mind generally to be inferred from the person's conduct viewed in light of all the accompanying circumstances." *Id.* (quoting *State v. Kihlstrom*, 1999 UT App 289, ¶10, 988 P.2d 949). "[S]o long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, [the court's] inquiry stops." *Id.* (quoting *State v. Hall*, 946 P.2d 712, 724 (Utah Ct. App. 1997) (internal quotations and citations omitted)).

Plaintiffs failed to show that Bryant's investigation and resulting findings were unreasonable based upon the facts and circumstances presented to him. Plaintiffs rely on *Baptiste v. J.C.Penney Co., Inc.*, 147 F.3d 1252 (10th Cir. 1998), for the proposition that Bryant failed to adequately investigate the alleged false alarm report against Howe.

The court in *Baptiste* explained that the information known to the officer, i.e., the conduct recorded on the videotape, Baptiste's explanation, her production of receipts for the alleged stolen rings, and the search of Baptiste's bag, purse, and pockets, which revealed no stolen merchandise, "did not provide reasonable grounds to believe the security guards' allegations of theft and did not provide probable cause to arrest" Baptiste. *Id.* at 1257. The court held in relevant part:

> Contrary to the officers' assertions that the videotape is ambiguous it does not suggest theft nor does it contradict Ms. Baptiste's explanation of the events. . . . The security guards' allegation were based solely on the conduct of Ms. Baptiste which was memorialized in its entirety on the videotape. The officers *viewed* the very same conduct on the videotape, which this court has concluded failed to establish probable cause. It was therefore not reasonable to rely on the security guards' allegations.

Id. (emphasis added). This is distinguishable from the circumstances presented in this case.

Unlike the case in *Baptiste*, Plaintiffs cannot show any evidence which was observed by Bryant and disregarded in relying on Wihongi's report. The Tenth Circuit provided that police officers are not required to forego arresting an individual based on initially discovered facts showing probable cause simply because that individual offers a different explanation. *Romero v. Fay*, 45 F.3d 1472, 1478 n.3 (10th Cir. 1995) (quotation omitted). Furthermore, "[a] policeman . . . is under no obligation to give any credence to a suspect's story nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause." *Id.* Although Plaintiffs claim that Bryant failed to listen to the tapes of the calls or review of the transcripts as part of his investigation, they do not identify evidence that was

available on the tapes but not reflected in Wihongi's report. (Pls' Mem. In Supp., 33-37).

The undisputed material facts remain, as reflected in Officer Shaun Wihongi's ("Wihongi") report, that:

1. In the original contact from Plaintiffs' dispatch to the Salt Lake City Police Department ("SLCPD"), Plaintiffs were informed that SLCPD does not respond to burglary alarms and that the on-scene victims must notify SLCPD. (Pls.' Ex. 10, 4);

2 Howe in response, contacted SLCPD dispatch and informed them that he was the "comp" and, the Plaintiffs' security guard was requesting SLCPD to a burglary in progress. *Id.*

3. *Upon Howe's information* to SLCPD dispatch, seven officers responded to the school. *Id.* (emphasis added).

4. Unable to find Plaintiffs' guard, SLCPD, at Wihongi's request, contacted Howe regarding the location of the guard. *Id.*

5. Dispatch informed Wihongi that Howe was wrong about the guard and Plaintiffs would not be sending a guard to the scene. *Id.*

6. Wihongi conducted follow-up investigations with Howe and Dianne Hoyt, the employee at West High School. *Id.*

7. Howe told Wihongi that he was "led to believe" the individuals at West High were in danger and, that he was not happy that SLCPD was not sending anyone to the scene. *Id.*

8. When Wihongi asked why Howe made those statements to SLCPD dispatch, Howe responded, "Whatever it takes, I thought this was a panic alarm." *Id.*

9. Howe told Wihongi that he (Howe) *made assumptions*. *Id.* (emphasis added).

10. Wihongi explained the difference of a panic alarm and a burglar alarm to Howe and how officers respond differently to the noted alarms. *Id.*

11. Upon a second call to Howe, Howe apologized for his miscommunication and stated that it would be fine if Plaintiffs were fined. *Id.*

12. Hoyt informed Wihongi that Plaintiffs suggested contacting SLCPD and that at no time did she or other employees feel that they were in immediate danger. *Id.*

As previously noted, the relevant language of Subsection 76-9-105(1) provides, "A person is guilty of giving a false alarm *if he initiates* . . . a report or warning of any . . . crime . . . *knowing* that the report or warning is false or *baseless* and is *likely to cause* . . . alarm or *action of any sort by any official* . . . organized to deal with emergencies." (emphasis added). Plaintiffs have failed to show any evidence

that the facts and circumstances presented to Bryant was not reasonably trustworthy or sufficient to warrant "a prudent [officer] in believing that an offense has been or is being committed." *Kerr*, 774 F.2d at 1031. Howe did initiate an alarm by his call to SLCPD stating that there was a burglary in progress, which was verified by a Peak Alarm guard, and his call did result in official action by SLCPD. The SLCPD were dispatched before any clarification was made regarding the Peak Alarm guard that was alleged to be on the scene and verified the alleged burglary in process.

In regards to the knowledge element, Bryant concluded that Howe should have known that a guard was not on a scene. (Pls.' Ex. 13, 114-118); *see also Id.* at 118, ll. 6-9 ("And he said himself [Howe], whatever it takes. And the way that Officer Wihongi wrote that, and I confirmed it with him was that was in the context of eliciting a police response"). As the *Ingram* court explained, "Knowledge or intent is a state of mind generally to be inferred from the person's conduct viewed in light of all the accompanying circumstances." 2006 UT App at ¶17 (citations omitted).

Based on the foregoing, as a matter of law, Plaintiffs are not entitled to summary judgment, their False Arrest/Imprisonment claim is DENIED.

Plaintiffs' Claim of Malicious Prosecution

Under Utah law, there are four elements to a malicious prosecution claim, *all of which must be*

proven: "(1) A criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding; (4) 'malice,' or a primary purpose other than that of bringing an offender to justice." *Chase v. Cedar City Corp.*, 2006 U.S. Dist. LEXIS 65638, *21 (D. Utah Sept. 12, 2006) (quotation omitted) (emphasis added).

Because it was determined under Plaintiffs' False Arrest/Imprisonment claim that Plaintiffs are not entitled to summary judgment as matter of law on their probable cause argument, Plaintiffs therefore, fail to meet a required element of malicious prosecution and, similarly, are not entitled to summary judgment as a matter of law on their Malicious Prosecution claim.

Based upon the foregoing, the Court DENIES Plaintiffs' Motion for Partial Summary Judgment.

Discussion and Analysis of Defendants' Motion for Summary Judgment

Immunity Pursuant to Utah Governmental Immunity Act

Defendants maintain that they are entitled to immunity under the Utah Governmental Immunity Act ("Act") relative to all of Plaintiffs' causes of action except Plaintiffs' claim for 42 U.S.C. §1983, Deprivation of Constitutional Rights.

Defendants assert, "To recover against a governmental employee personally for injuries occurring during the performance of the employee's duties, a plaintiff's sole remedy is through the Immunity Act, and to properly state a claim for relief, the plaintiff must allege fraud or malice." *Straley v. Halliday*, 2000 UT App 38, ¶12, 997 P.2d 338 (citing 63-30-3[5] (1996); *see* 63-30-4(3) to (4); *Day v. State ex rel. Utah Dep't of Public Safety*, 1999 UT 46, 980 P.2d 1171, 1186 (Utah 1999) ("Government employees are now personally liable only for fraud or malice."[6]) Utah law mandates strict compliance with the requirements of the Act. *Greene v. Utah Transit Authority*, 37 P.3d 1156, 1159 (Utah 2001). Failure to comply with the Act's requirements results in dismissal of a complaint for lack of subject matter jurisdiction. *Id.*

While the Act provides that a civil action against a government employee requires that the employee acted or failed to act through fraud or malice, *see* Utah Code Ann. § 63-30-4(3)(b)(i), (4)(a), a recent Utah Supreme Court decision addressed whether the

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[5] Subsection 63-30-3(3) provides in relevant part that "all governmental entities are immune from suit or any injury which results from the exercise of a governmental function[.]" (2003).

[6] Plaintiffs contend that since they filed their action in 2005, the 2004 version of the Act is the appropriate version to consider. However, the Legislature made it clear that "injuries alleged to be caused by a governmental entity that occurred before July 1, 2004, be governed by the provisions of Title 63, Chapter 30, Utah Governmental Immunity Act[.]" Laws 2004, c. 267, 48.

Act requires an express statement of "malice" or "fraud" against state officers. *Mecham v. Frazier*, 2008 UT 60, 2008 Utah LEXIS 116 (2008). While the Court explained that "fraud" or "malice" does not need to be expressly averred, "the contents of the notice of claim must be sufficient to reasonably alert the governmental entity of the nature of the claim – that the claimant seeks to bring a cause of action against a government employee due to the employee's fraudulent or malicious conduct." *Id.* at ¶19. That is, "[w]hether a notice of claim contains an allegation of fraud or malice depends on the content of the notice as a whole, not on the use or nonuse of particular words." *Id.* at ¶20.

In *Miskin v. Carter*, 761 P.2d 1378, 1379 (Utah 1988) (citing *McFarland v. Skaggs Companies*, 678 P.2d, 298, 304 (Utah 1998)), the standard[7] of malice in false imprisonment cases was "malice in fact" or "actual malice." "Actual malice" or "malice in fact" is defined as willful and malicious misconduct. *McFarland*, 678 P.2d at 303, n.11 (citing *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314, 327 (Utah 1979)). "It

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[7] The other standard is "implied malice" or "malice in law." "Malice in law does not consist of personal hate or ill will of one person towards another but rather refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen." *McFarland*, 678 P.2d at 303, n.12 (quotation omitted). Even if the Court were to consider this standard in Plaintiffs' claim of false arrest/imprisonment, Plaintiffs failed to show that Bryant had the state of mind which is reckless of the law and of the legal rights of Howe.

has also been commonly described as an act done with evil intent and with the purpose of injuring." *Id.* (citing *Gilmer v. Playboy Club of Denver, Inc.*, 513 P.2d 1065 (Colo. Ct. App. 1973)).

Aside from general conclusory statements[8], Plaintiffs' Notice of Claim, filed June 25, 2004, fails to assert any claims of fraud or malice against Defendants in their individual capacities. Furthermore, although Plaintiffs' notice avers specific acts against Defendant Werner, these actions are against the alarm industry itself and, as noted by Plaintiffs, involve "the alleged practices of a few companies," Notice at p.3, and not Plaintiffs. An incident in which Plaintiff Peak Alarm was involved with Defendant Werner occurred on or about March 21, 2002, approximately one year before the alleged false arrest. Notice at 4. Plaintiffs explain that the 2002 incident related to Defendant Werner issuing a letter to a Peak Alarm customer encouraging them to consider another alarm company. *Id.* That incident is insufficient to show that Werner acted with malice in the June 27, 2003, arrest of Plaintiff Howe.

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[8] For example, Plaintiffs write that Defendants "have sought to tarnish [Peak Alarm's] reputation and destroy [the] relationship [between Peak Alarm and law enforcement] through increasingly aggressive, unwarranted and ultimately unlawful and unconstitutional conduct." Notice of Claim from Stephen C. Clark, counsel for Plaintiffs, (June 25, 2004) (on file with Salt Lake City Recorder), p.1.

Because the Act does not apply in instances of constitutional violations, *Bott v. DeLand*, 922 P.2d 732, 736 (Utah 1996), the Court's analysis does not end in determining that Plaintiffs failed to assert fraud or malice against Defendants. To set forth a constitutional claim, a plaintiff must show in part, that he suffered a "flagrant violation" of his constitutional rights. *Spackman v. Bd. of Educ. of Box Elder County Sch. Dist.*, 2000 UT 87, ¶23, 16 P.3d 533.

A flagrant constitutional violation is a violation of "clearly established" constitutional rights "of which a reasonable person would have known." *Id* (quotation omitted). "To be considered clearly established, 'the contours of the right must be *sufficiently clear* that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quotation omitted) (emphasis added). "The requirement that the unconstitutional conduct be 'flagrant' ensures that a government employee is allowed the ordinary 'human frailties of forgetfulness, distractibility, or misjudgment without rendering [him or her]self liable for a constitutional violation.'" *Id.* (quotation omitted).

As discussed above, *see supra* pp. 2-11, Plaintiffs failed to show as a matter of law that Bryant did not have probable cause to "arrest" Howe or, that Bryant in arresting Howe, understood that he was violating a sufficiently clear right of Howe's. Therefore, Plaintiff Howe failed to establish that he suffered a "flagrant violation" of his constitutional rights.

Furthermore, Plaintiffs' claims are time barred under Section 63-30-12[9]. Howe was issued the citation on June 27, 2003. The Salt Lake City Justice Court docket reflects that Howe was arraigned on July 11, 2003. (Pls.' Ex. 65). On July 23, 2003, the citation was filed and, on July 29, 2003, a summons and formal information was filed by the prosecutor. *Id.* Howe's "not guilty" plea was entered on July 30, 2003. *Id.* Plaintiffs assert that their Notice of Claim is timely as it was filed when Howe became subject to the legal process on April 14, 2004, the date of the bench trial. Plainitffs' [sic] assertion is incorrect.

The Tenth Circuit explained, in its analysis of a 1983 wrongful detention analysis, that false imprisonment ends when the "victim is released or when the victim's imprisonment becomes 'pursuant to [legal] process – when, for example, he is bound over by a magistrate or arraigned on charges." *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008) (quoting *Wallace v. Kato*, 127 S. Ct. 1091, 1096 (2007)). The Justice Court docket clearly reflects that Howe was arraigned[10] on July 11, 2003. At the latest,

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[9] Provides in relevant part, "A claim against the state, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general within one year after the claim arises[.]" (2003).

[10] An arraignment is defined as a "proceeding whereby a defendant is brought before a judge having jurisdiction to try the offense so that the defendant may be formally apprised of the

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Howe became subject to the legal process on July 30, 2003, when he plead not guilty. *See also* Utah Code Ann. § 77-2-2(3) (2003) ("'Commencement of prosecution' means the filing of an information or an indictment"). Therefore, Plaintiffs had until July 30, 2004, to file a notice of claim which complied with the fraud and malice requirements, as discussed above. Plaintiffs' Complaint was filed on April 7, 2005.

Based upon the foregoing, the Court DISMISSES the following causes of action:

1. False Arrest/Imprisonment – against all individual Defendants in their individual capacities

2. Malicious Prosecution – against all individual Defendants in their individual capacities

3. Violation of Utah Constitution[11], Article I Sections 1, 7, 14, 15 – against all Defendants in their individual and official capacities

4. Violation of Utah's Citizen Participation in Government Act[12] – against all

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charges pending against him or her and directed to plead to them." 21 Am Jur 2d Criminal Law § 545 (2008).

[11] Plaintiffs write, "For all intents and purposes[], the state constitutional grounds have been addressed with the federal constitutional grounds." (Pls.' Opp., 107).

[12] The Citizen Participation in Government Act, 75-58-101 et. seq. applies when "[a] defendant in an action [] believes that the action is primarily based on, relates to, or is in response to

(Continued on following page)

individual Defendants in their individual capacities

5. Tortious Interference with Existing and Prospective Business Relations[13] – against all individual Defendants in their individual capacities

6. Intentional Infliction of Emotional Distress[14] – against all individual Defendants in their individual capacities

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an act of the defendant while participating in the process of government and is done primarily to harass the defendant." Utah Code Ann. 78-58-103(1). Plaintiffs claim fails for several reasons. First, none of the individual Defendants were parties to the prosecution. The action was brought by the City. Second, there has been no admissible evidence that Howe's prosecution had anything to do with his participation in the government process. Third, Plaintiffs failed to establish that there was no substantial basis in fact and law to commence and continue action against Howe. Finally, this cause of action is similar to Plaintiff's malicious prosecution and as such, has been adequately addressed under the Court's analysis as reflected in the Ruling.

[13] Plaintiffs also failed to show that (1) Defendants intentionally interfered with Plaintiffs' existing or potential economic relations, (2) for an improper purpose or by improper means, (3) injuring Plaintiffs. *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982).

[14] Plaintiffs also failed to establish that Defendants intentionally acted toward Plaintiffs "(1) with the purpose of inflicting emotional distress or (2) where any reasonable person would have known that such would result and, his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality." *Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶58, 70 P.3d 17.

7. Defamation[15] – against Defendant Werner in her individual capacity

8. Conspiracy to Violate Constitutional Rights[16] – against all individual Defendants in their individual capacities

9. Negligence[17] – against Defendant Salt Lake City

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[15] The Act also provides in relevant part that immunity is not waived for injuries arising out of or in connection with libel or slander. Utah Code Ann. §63-30-10(2).

The Court notes that while Plaintiffs, in their Opposition to Defendant's Motion for Summary Judgment, maintain that Werner's alleged defamation is a continuing tort, because this theory was raised for the first time in Plaintiffs' Opposition, the Court does not consider the argument. *See Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶31, 48 P.3d 895 (citing Utah R. Civ. P. 7, 8, 9, 10).

[16] Section 1985(3) provides a cause of action for any person or class of persons injured by a conspiracy organized "for the purpose of depriving, either directly or indirectly [such persons] of the equal protection of the laws." *Patterson v. Am. Fork City*, 2003 UT 7, ¶29, 67 P.3d 466 (quoting 42 U.S.C. § 1985(3) (1994)). Plaintiffs failed to show any competent evidence to support this claim.

[17] Although under the Negligence claim Salt Lake City is named as the sole Defendant, in Plaintiffs' Amended Complaint, Defendants as public employees are identified for "hav[ing] a duty to individuals and entities such as Plaintiffs to exercise reasonable care in the performance of their duties, including the interpretation, application and enforcement of city ordinances and state statutes." (Am. Compl. 20, no.81). Plaintiffs fail to identify an ordinance or statute that was not interpreted or applied by Defendants as public employees.

42 U.S.C § 1983

Plaintiffs assert that (1) Defendants' conduct that led to the alleged unreasonable seizure of Howe, violated Plaintiffs' rights under the Fourth, Fifth, and Fourteenth Amendments; (2) Defendant Salt Lake City Corporation implemented and executed an unonstitutional policy; (3) one or more individual Defendants failed to properly supervise their subordinates; and, (4) Defendants intended and did retaliate against Plaintiffs in their association and expression regarding the "no-response" ordinance.

42 U.S.C. § 1983 forbids any person acting under color of state law from depriving any citizen of their federal rights. *Patterson v. Am. Fork City,* 2003 UT 7, ¶22, 67 P.3d 466. The violation of a state statute does not automatically give rise to a violation of rights secured by the U.S. Constitution. *Id.* at ¶25.

The law provides special protection for officials sued in their individual capacity for damages under 42 U.S.C.S. § 1983 for acts committed within the scope of their office. *Ambus v. Utah State Bd. of Educ.,* 858 P.2d 1372, 1377 (Utah 1993). This protection is designed to shield public officials from undue interference with their duties and from "potentially disabling threats of liability." *Id.* An official's actions may be protected by either absolute or qualified immunity.

Absolute immunity provides "complete protection from liability for damages and defeats a suit at the

outset." *Id.* (quotation omitted). While the Supreme Court has granted such immunity "quite sparing[ly]," (internal quotation omitted), the Court has recognized that "there are some officials whose special functions require a full exemption from liability." *Id.* (quotation omitted). "Absolute immunity has been extended to judges performing judicial acts within their jurisdiction, (internal citation omitted), prosecutors performing acts 'intimately associated with the judicial phase of the criminal process,' (internal quotation omitted), and certain administrative officials who perform functions analogous to those of judges and prosecutors." *Id.* (citation omitted).

Qualified immunity shields government officials "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Id.* at 1377-78 (quotation omitted); *see also Pierce v. Gilchrist*, 359 F.3d 1279, 1299 (10th Cir. 2004) ("Qualified immunity is designed to protect public officials who act in good faith, on the basis of objectively reasonable understandings of the law at the time of their actions, from personal liability on account of later-announced, evolving constitutional norms"). To avoid summary judgment, a plaintiff must establish "a heavy two-part burden." *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1150 (10th Cir. 2006) (quotation omitted). The plaintiff must show (1) "that the defendant's actions violated a constitutional or statutory right" and (2) t'hat [sic] the right was clearly

established at the time of the defendant's unlawful conduct." *Id.* (quotation omitted).

The Utah Supreme Court explained that a "clearly established" right is a right "established in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Ambus,* 858 P.2d at 1378 (quotation omitted). A plaintiff "must do more than identify a clearly established legal test and then allege that the defendant has violated it. The plaintiff must demonstrate a *substantial correspondence* between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Hannula v. City of Lakewood,* 907 F.2d 129, 131 (10th Cir. 1990) (citation omitted).

Additionally, the Supreme Court explained that a negligent act does not give rise to liability, *Ambus,* 858 P.2d at 1378 n.4 (citing *Zinermon v. Burch,* 494 U.S. 113, 128 n.14, (1990)) and, in order for liability to arise, "a defendant's *direct personal responsibility* for the claimed deprivation of a constitutional right must be established." *Novitsky v. City of Aurora,* 491 F.3d 1244, 1254 (10th Cir. 2007) (quoting *Trujillo v. Williams,* 465 F.3d 1210, 1227 (10th Cir. 2006)) (emphasis added).

Plaintiffs' §1983 Claim – Violation of Fourth, Fifth, & Fourteenth Amendments

The Court considers Plaintiffs' first 1983 allegation that Defendants' conduct that led to the alleged unreasonable seizure of Howe, violated Plaintiffs' rights under the Fourth[18], Fifth[19], and Fourteenth[20] Amendments.

The Fourth Amendment guarantees citizens the right "to be secure in their persons . . . against *unreasonable* . . . seizures." *Novitsky,* 491 F.3d at 1253

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[18] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[19] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[20] In relevant part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(emphasis added). "A seizure occurs for Fourth Amendment purposes 'whenever a police officer accosts an individual and restrains his freedom to walk away.' (internal quotation omitted). The 'reasonableness' of a particular seizure depends on the balance between 'the nature and quality of the intrusion on the individual's Fourth Amendment interests . . . [and] the importance of the governmental interests alleged to justify the intrusion.'" *Id.* (quotation omitted). The Supreme Court held that arrests, considered the most intrusive of seizures, "are reasonable only if supported by probable cause." *Id.* (quotation omitted).

Plaintiffs assert that whether there was probable cause, is an issue of fact that must be determined by the jury. However, the determination of the question of probable cause, or the want of it, involves a mixed question of law and fact. *Terry,* 605 P.2d 314, 320-21. As to what particular facts in each case will constitute probable cause is a question of law for the court. *Id.* When the facts are in dispute, then as to what facts are established by the testimony is exclusively for the jury. *Id.* However, when the facts are admitted or otherwise established, the question as to whether they constitute probable cause or not is purely a question of law. *Id.* Because the parties have provided as exhibits police reports, transcripts of telephone calls, and depositions, there are no disputes of *material fact*[21], but only remains a question of law for

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[21] Plaintiffs present disputes of fact that are immaterial. For example, Plaintiffs maintain in part that Howe had a

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this Court to determine whether probable cause existed.

This Court addressed the issue of probable cause[22], *see supra* pp. 2-11, and based upon that analysis, the Court as a matter of law determined that Plaintiffs failed to show that Defendants acted without probable cause.

Additionally, in *Martinez v. Carr,* 479 F.3d 1292, 1295 (10th Cir. 2007), the Tenth Circuit addressed the "pure legal question" of whether the issuance of a misdemeanor citation, requiring appearance at trial

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reasonable basis for characterizing the situation as a burglary in progress because (1) Diane Hoyt reported two unidentified individuals entered the school and were still present; (2) Hoyt and her supervisor approached Howe with what they described as an emergency or panic situation; (3) SLCPD assumed the individuals were there unlawfully and had criminal intent; and (4) a nationally recognized expert opined that Howe did the right thing. (Pls.' Opp., 16-20). While these are facts, these are not material facts where "reasonable minds could differ on whether defendant's conduct measures up to the required standard." *Sanns v. Butterfield Ford,* 2004 UT App 203, ¶6, 94 P.3d 301 (quotation omitted). As noted before, in a motion for summary judgment, it is not the place of the court to weigh evidence or assess credibility, rather it is the role of the court to determine whether there is an issue of material fact and whether the moving party is entitled to summary judgment as a matter of law. *See generally Mountain States Tel.,* 681 P.2d 1258

[22] When a constitutional right claim is made under the Fourth Amendment's right to be free from unreasonable seizures, the focus of the court's analysis is the probable cause supporting the plaintiff's arrest. *Grubbs v. Bailes*, 445 F.3d 1275, 1278 (10th Cir. 2006).

in lieu of arrest, constituted a Fourth Amendment seizure. The court explained that Martinez was given a choice of accepting the citation or being arrested, "something very nearly the opposite of a *seizure,* which is commonly understood as circumstances when a "reasonable person would have believed that he was not free to leave." *Id.* (quotation omitted) (emphasis in the original). The court stated, "In fact, it seems that the issuance of the citation resulted in Mr. Martinez being *released* from the detention to which he previously had been subjected." *Id.* at 1296 (emphasis in original).

The court further explained:

> The Supreme Court has instructed that, under such statutory rubrics [addressing New Mexico's statute of arresting a person without a warrant for a petty misdemeanor][23], law enforcement officers are entitled to substantial discretion in choosing which alternative to pursue [i.e., offering the person "arrested" the option of accepting a citation to appear in lieu of taking him to jail]. (internal citation omitted). Holding that both alternatives constitute "seizures" for Fourth Amendment purposes (and are, thus, subject to all the review and restrictions that flow from such a conclusion) would surely disincentivize the use of citations, at least to a certain degree, a result inconsistent with

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[23] Similar options are afforded Utah law enforcement officers under Utah Code Annotated Sections 77-7-15, 77-7-18.

> the desire to mitigate intrusiveness on private citizens and recent efforts to encourage the use of citation in lieu of arrest procedure.

Id. at 1297.

Plaintiffs also assert that Bryant's retaining Howe's driver license was an unconstitutional seizure. (Pls.' Opp., 73) (citing *State v. Chism,* 2005 UT App 41, 107 P.3d 706).[24] However, Plaintiffs failed to show that Bryant's actions were anything than an unintended act. (Defs.' Reply, 9 at no.29).

While Defendants presented an argument asserting why Plaintiffs' malicious prosecution fails under the Fourteenth Amendment, Plaintiffs contend that prior to trial the constitutional underpinning for a 1983 malicious prosecution claim must be the Fourth Amendment's right to be free from unreasonable seizure. (Pls.' Opp., 92) (citing *Becker,* 494 F.3d at 914). Therefore Plaintiffs assert, it does not require the "shocks the conscience" element. Plaintiffs claim that their substantive due process applies to Defendant Werner's "stigma plus" violation.[25] *Id.*

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[24] The court explained that while officer's only basis for detaining the defendant was suspicion of underage tobacco possession, justification for further detention was "dispelled" when the defendant presented his state issued driver's license. Therefore, the officer's further detention of defendant for further investigation and resulting search and arrest was unlawful.

[25] The Court notes that Plaintiffs' "stigma plus" violation under the Fourteenth Amendment is asserted against Defendant Werner and not the other Defendants.

Plaintiffs' "stigma plus"[26] argument was raised for the first time in their opposition. The Utah Supreme Court explained, "A plaintiff cannot amend the complaint by raising novel claims or theories for recovery in a memorandum in opposition to a motion to dismiss or for summary judgment, (citation omitted), because such amendment fails to satisfy Utah's pleading requirements. *Holmes Dev., LLC v. Cook,* 2002 UT 38, ¶31, 48 P.3d 895 (citing Utah R. Civ. P. 7, 8, 9, 10). Therefore, such an argument fails under Plaintiffs' 1983 claim.

The Court, however, also considers Plaintiffs' general Fourteenth Amendment substantive due process claim. The *Becker* court explained where a substantive due process claim may arise. The court explained:

> Justice Souter's concurrence in Albright suggested the possibility that initiating an unwarranted prosecution that is dismissed before trial may in some unusual circumstances result in substantive due process

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[26] The stigma plus standard requires a plaintiff in asserting that the government has violated the Due Process Clause by impugning his good name, reputation, honor, or integrity, must demonstrate that: (1) the government made a statement about him that is sufficiently derogatory to injure his reputation, that is capable of being proved false, and that he asserts is false, and, (2) the plaintiff experienced some governmentally imposed burden that significantly altered his status as a matter of state law. *Gwinn v. Awmiller*, 354 F.3d 1211, 1216 (10th Cir. 2004) (citations omitted).

> violations separate from a Fourth Amendment seizure: "There may indeed be exceptional cases where some quantum of harm occurs in the interim period after groundless criminal charges are filed but before any Fourth Amendment seizure. Whether any such unusual case may reveal a substantial deprivation of liberty . . . independent of the Fourth Amendment, are issues to be faced only when they arise." *Albright,* 510 U.S. at 291 (Souter, J. concurring); *see also Darrah v. City of Oak Park,* 255 F.3d 301, 309 (6th Cir. 2001) (noting "§ 1983 malicious prosecution claims may still be available pursuant to the Fourteenth Amendment's substantive due process rights" in cases that do not involve a Fourth Amendment seizure); *Torres v. McLaughlin,* 163 F.3d 169, 173 (3d Cir. 1998) (concluding Albright forecloses substantive due process analysis only if the claim "is covered by the Fourth Amendment").

494 F.3d at 922. The court continued that a Fourteenth Amendment substantive due process claim is recognized in the "narrowest of circumstances," and, the "conduct alleged 'must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power . . . [It] must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Id.* at 922-23 (quotation and citation omitted). This standard required is met "in only the most extreme

circumstances, typically involving some violation of physical liberty or personal physical integrity." *Id.*

Plaintiffs failed to show any extreme conduct against any Defendants including Defendant Werner. *See* Pls.' Exs. 20, 23, 24, 40-61, 63. Therefore, Plaintiffs' claims of violation under the Fourteenth and Fifth[27] Amendments fail against all Defendants.

Plaintiffs' Section 1983 Claim – Policy Adopted by Salt Lake City Corporation

Plaintiffs' second 1983 claim provides that "Defendant Salt Lake City Corporation implemented and executed an established policy, practice, custom or decision officially adopted or informally accepted or condoned by the City and its officials and employees." (Am. Compl., 15 at no. 45).

The Supreme Court held that "[a] municipality cannot be held liable for its officers' actions under § 1983 *unless* those actions were caused by a policy or custom of the municipality." *Novitsky,* 491 F.3d at 1259 (citing *Monell v. Dep't of Social Servs.,* 436 U.S. 658, 690 (1978)) (emphasis added). The Supreme Court also concluded that there are "limited circumstances" upon which an allegation for failure to train can be the basis for liability under 1983. *City of*

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[27] The Court notes that neither party addressed this Amendment specifically. However, because it is a due process right, the Court considers it under its Fourteenth Amendment analysis.

Canton v. Harris, 489 U.S. 378, 388 (1989). Only when the failure to train "amounts to deliberate indifference to the rights of the person[ ]" will an inadequacy of training serve as liability. *Id.* "In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *Id.* at 390-91 (citations omitted).

Plaintiffs assert that they have "presented an undisputed prima facie case that Shanna Werner engaged in a 'pattern of tortious conduct,' namely her string of defamatory statements. (footnote omitted). That fact demonstrates that she was inadequately trained, and municipal liability therefore attaches." (Pls.' Opp, 105-06).

Plaintiffs failed to identify a policy or custom that caused their injury. *See Bd. Of County Comm'rs of Bryan County v. Okla.,* 520 U.S. 397, 402 (1997) (citations omitted). Because Plaintiffs failed to identify a policy or custom that caused their injury, they cannot identify the deficiency in the policy or custom that caused Werner's or others indifference. *City of Canton,* 489 U.S. at 391 ("[F]or liability to attach . . . the identified deficiency in a city's training program *must* be closely related to the ultimate injury." (emphasis added)). "[P]ermitting cases against cities for their 'failure to train' employees to go forward under

§1983 on a lesser standard of fault would result in *de facto superior* liability on municipalities – a result we rejected in *Monell,* U.S. [sic] at 693-94." *Id.*

Because Plaintiffs failed to identify the custom or policy that allegedly injured them and therefore, failed to identify the alleged deficiency in the custom or policy, their claim for municipal liability fails.

Plaintiffs' Section 1983 Claim – Respondeat Superior/Vicarious Liability

Plaintiffs claim that "one or more individual Defendants failed to take action they were required to take to properly supervise their subordinates and stop their unlawful and malicious actions, in a manner that amounts to deliberate indifference." (Am. Compl, 15, no. 46).

In relation to its discussion of municipality liability, the Supreme Court explained:

> We also recognized that a municipality may not be held liable under § 1983 solely because it employs a tortfeasor. Our conclusion rested partly on the language of § 1983 itself. In light of the statute's imposition of liability on one who "subjects [a person], or causes [that person] to be subjected," to a deprivation of federal rights, we concluded that it "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor."

> (internal quotation omitted). Our conclusion also rested upon the statute's legislative history. As stated in *Pembaur v. Cincinnati*, 475 U.S. 469, 479, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986), "while Congress never questioned its power to impose civil liability on municipalities for their own illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of others" (internal citation omitted).

Bd. of County Comm'rs, 520 U.S. at 402.

To show liability by a supervisor, "the plaintiff must establish 'a deliberate, intentional act by the supervisor to violat[e] constitutional rights.'" *Serena v. Colo. Dep't. of Corrections*, 455 F.3d 1146, 1151 (10th Cir. 2006) (quotations omitted). The supervisor must be "personally 'involved in the constitutional violation,' and a 'sufficient causal connection' must exist between the supervisor and constitutional violation." *Id.* (quotation omitted). That is, it must be show [sic] that the supervisor "actively particip[ed]" or "acquiesc[ed]" in the constitutional violation of the subordinate. *Id.* (citations omitted).

Plaintiffs' sole claim against Defendants Dinse and Atkinson as reflected in their Amended Complaint, (p.11, no.27), is that at a meeting requested by Plaintiff Jerry Howe, "Defendants Dinse and Atkinson made clear Ms. Werner was engaged in the

above-described conduct[28] under their direction and with their authorization and approval." In their Opposition, Plaintiffs provide conclusory and immaterial statements made by Defendants Dinse and Atkison [sic] drawn from their respective depositions. (Pls.' Opp. 48-52). For example, Plaintiffs write that: (1) "Captain Peck and Chief Atkinson both testified that they had never seen the letter that Werner wrote to the Attorney General[29], despite the fact that Chief Dinse testified that he expected that Werner would have cleared it with someone in her chain of command;" *Id.* at p. 49, no.7 (citation omitted), (2) "Chief Dinse testified that he expected Chief Atkinson to monitor Shanna Werner;" *Id.* at no. 9 (citation omitted), (3) "Chief Dinse acknowledged the confrontation between the police department and alarm industry was not a good thing, but never instructed Werner to be more collaborative or cooperative;" *Id.* at p.50, no.12 (citation omitted), (4) "Chief Atkinson testified that he did not ascertain whether the dispatchers had responded appropriately in the West High incident, did not know of any discipline against the dispatchers related to the incident, and did not know of any

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[28] Plaintiffs list alleged defamatory statements made by Defendant Werner to the media and, Werner's alleged participation in the "arrest" of Howe.

[29] The letter, dated April 30, 2003, specifically names Central Station Alarm Association, State Farm Insurance, Farmer's Insurance, All State Insurance and Bear River and, discusses the Salt Lake City verified response ordinance. Plaintiffs are not named parties in the letter.

investigation that concluded that the police responded appropriately to the incident;" *Id.* at no.15 (citation omitted), and, (5) "Chief Burbank did nothing to investigate the reasonableness of the arrest even after Plaintiffs alerted the [sic] Chief Dinse to the police department's illegal acts." *Id.* at p.51, no. 17 (citation omitted).

As the Tenth Circuit explained, "In the context of supervisor liability under § 1983, "mere negligence" is not enough. Rather, '[l]iability of a supervisor under §1983 must be predicated on the supervisor's deliberate indifference.'" *Serena,* 455 F.3d at 1154 (quotation and citation omitted). "Deliberate indifference requires that the official 'both be aware of facts for which the inference could be draw [sic] that a substantial risk of harm exists, and he must also draw the inference.'" *Id.* at 1154-55 (quotation and citation omitted).

Plaintiffs failed to show any causal connection between Dinse's and Atkinson's actions as supervisor's and Werner's and Bryant's alleged unlawful and malicious actions. Not only did Plaintiffs fail to show any causal connection, they further failed to show that Dinse and Atkinson were deliberately indifferent to the alleged actions.

Plaintiffs' Section 1983 Claim – Retaliation under the First Amendment

Plaintiffs contend that "Defendants intended to and did retaliate against [them and] . . . restrain[ed]

them from engaging in the constitutionally protected activity of engaging in associations and expressing and advocating their viewpoint on the subject of 'no-response' ordinances while Salt Lake City remained free to express and advocate its own competing viewpoint on the same subject, and by punishing them for expressing their viewpoint." (Am. Compl., 15, no. 47). Specifically, Plaintiffs assert that Howe's initial call to police dispatch was constitutionally protected, (Pls.' Opp., 96) (citing *Meyer v. Bd. of County Comm'rs of Harper County,* 482 F.3d 1232, 1243 (10th Cir. 2007) (internal citation omitted)), as well as, Plaintiffs' participation in the Murray City meeting, their association in the alarm industry, and "as members of various trade groups within the industry." *Id.* at 97.

To show retaliation for exercising freedom of speech, a plaintiff must show that (1) they were engaged in constitutionally protected activities, (2) the defendant's actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendant's adverse action was substantially motivated as a response to the Plaintiffs' exercise of constitutionally protected conduct. *Worrell v. Henry,* 219 F.3d 1197, 1212 (10th Cir. 2000) (quotation omitted).

Plaintiffs failed to establish how Defendants' actions caused them to suffer in their participation in public meetings and their association and membership in the alarm industry. Furthermore, in regards to Plaintiffs' assertion that Howe's call to dispatch is itself protected fails in instances when

that statement made is knowingly false or made with reckless disregard of the truth. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

In the alternative, Plaintiffs claim that they can show a connection of retaliation through the absence of probable cause in the arrest and prosecution of Howe. The Supreme Court summarized regarding such claims of retaliation:

> [T]he complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort. Probable cause or its absence will be at least an evidentiary issue in practically all such cases. Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven.

Hartman v. Moore, 547 U.S. 250, 265-66 (2006).

As discussed above, *see supra* pp. 2-11, Plaintiffs failed to show as a matter of law that Bryant did not have probable cause to "arrest" Howe, therefore, Plaintiffs' retaliatory-prosecution claim fails. Furthermore, although Plaintiffs raises [sic] non-retaliatory claims, such claims will not be considered as they were raised for the first time in Plaintiffs' Opposition.

Conclusion

Based upon the foregoing, the Court concludes as follows:

1. Plaintiffs' Motion for Partial Summary Judgment is DENIED because Plaintiffs failed to show that as a matter of law Defendants did not have probable cause to "arrest" Howe under Utah Code Annotated Section 76-9-105.

2. Defendants' Motion for Summary Judgment is GRANTED on the following bases:

   (i) Defendants are entitled to immunity under the Utah Governmental Immunity Act and therefore, Plaintiffs' First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth causes of action are DISMISSED;

   (ii) Defendants are entitled to qualified immunity under 42 U.S.C. § 1983 and therefore, Plaintiffs' Third Cause of Action is DISMISSED.

Pursuant to this ruling disposing of all Plaintiffs' claims, the case against the Defendants is DISMISSED.

This Ruling stands as the ORDER of the Court. No further Order is required.

Dated 5th day of October, 2008.

BY THE COURT:

/s/ LA DEVER [SEAL]
L.A. DEVER
DISTRICT COURT JUDGE

IN THE UTAH SUPREME COURT

Peak Alarm Company, Inc., a Utah corporation; Jerry D. Howe, an individual; and Michael Jeffrey Howe, an individual,

Plaintiffs and Appellants,

v.

Case No. 20080918-SC

Salt Lake City Corporation, a Utah municipal corporation; Sharma Werner, an individual; Charles F. "Rick" Dinse, an individual; Scott Atkinson, an individual; James Bryant, an individual; and John Does I-X, individuals,

Defendants and Appellees.

ORDER

(Filed Jun. 28, 2010)

This matter is before the court upon Appellee's Petition for Rehearing, filed on May 3, 2010.

IT IS HEREBY ORDERED that pursuant to Rule 35 of the Utah Rules of Appellate Procedure the petition for rehearing is denied.

For The Court:

6-28-10
Date

/s/Matthew B. Durrant
Matthew B. Durrant
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2010, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

KENNETH A. OKAZAKI
STEPHEN C. CLARK
KATHLEEN E. MCDONALD
JONES WALDO HOLBROOK & MCDONOUGH
170 S MAIN ST STE 1500
PO BOX 45444
SALT LAKE CITY UT 84145-0444

J. WESLEY ROBINSON
SALT LAKE CITY ATTORNEYS OFFICE
451 S STATE ST STE 505
PO BOX 145478
SALT LAKE CITY UT 84114-5478

ARTHUR FINE
MITCHELL SILBERBERG KNUPP
11377 W OLYMPIC BLVD
LOS ANGELES CA 90064-1683

Dated this July 1, 2010.

By /s/ Susan Richards
Judicial Assistant

Case No. 20080918
District Court No. 050906433